

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1921.

No. 3741 **841**

THE DESIGNER PUBLISHING COMPANY, INC.,
APPELLANT,

vs.

FEDERAL TRADE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 25, 1921.

PRINTED NOVEMBER 3, 1921.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1921.

No. 8741.

THE DESIGNER PUBLISHING COMPANY, APPELLANT,

vs.

FEDERAL TRADE COMMISSION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Bill of complaint.....	1	1
Exhibit A.....	14	9
"B".....	19	14
"B ₁ ".....	46	28
"C".....	73	42
"D".....	77	45
Affidavit	140	79
Rule to show cause.....	143	80
Motion to dismiss.....	144	81
Motion of defendant to dismiss bill of complaint granted; cause dismissed for want of equity; appeal noted by complainant..	145	82
Order fixing bond on appeal.....	146	82
Memorandum: Undertaking on appeal approved and filed.....	146	83
Assignment of errors.....	146	83
Designation of record.....	147	83
Clerk's certificate.....	149	84

Court of Appeals of the District of Columbia.

No. 3741.

THE DESIGNER PUBLISHING COMPANY, INC., Appellant,

vs.

FEDERAL TRADE COMMISSION.

a Supreme Court of the District of Columbia.

In Equity.

No. 38106.

THE DESIGNER PUBLISHING COMPANY, INC., Plaintiff,

vs.

FEDERAL TRADE COMMISSION, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of Complaint.*

Filed July 29, 1920.

In the Supreme Court of the District of Columbia.

In Equity.

No. 38106.

THE DESIGNER PUBLISHING COMPANY, INC., Plaintiff,

vs.

FEDERAL TRADE COMMISSION, Defendant.

To the Supreme Court of the District of Columbia:

1. The plaintiff, The Designer Publishing Company, Inc., is a corporation organized and existing under and by virtue of the laws

of the State of New York and has its principal office in the City, County and State of New York, and is a citizen and resident of said State; and is a consolidation of the Standard Fashion Company and New Idea Pattern Company, which last named companies ceased to do business as such.

2. The defendant, the Federal Trade Commission, is a body corporate organized and existing under and by virtue of an Act of Congress of the United States entitled "An Act To create a Federal Trade Commission to define its powers and duties and for other purposes" approved September 26, 1914, hereinafter referred to as the Federal Trade Commission Act, and has its principal office in and is a resident of the District of Columbia.

3. The said defendant on or about March 24, 1919, issued a complaint, a copy of which is hereto attached, marked "Exhibit A" and by reference made a part hereof with the same force and effect as if set forth herein in full, in which complaint said defendant charged the Butterick Company, Federal Publishing Company, Standard Fashion Company and New Idea Pattern Company, in the first count, with the violation of Section 5 of the aforesaid Act of Congress, and in the second count with the violation of Section 3 of the Act of Congress approved October 15, 1914, commonly known as the "Clayton Act."

4. The said defendant in issuing the aforesaid complaint and requiring the respondents therein named, within thirty (30) days after service of said complaint to file with the Commission an answer in conformity with Rule 3 of the Rules of Practice of the Commission, pretended to be acting under and pursuant to the terms of the aforesaid Federal Trade Commission Act, and to derive its authority to require the plaintiff and the other respondents named in said complaint, to file such answers solely and exclusively from said Act and especially from Section 5, which reads in part as follows, to wit:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

* * * * *

Whenever the commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and

upon good cause shown may be allowed by the commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in which it shall state its findings as to the facts, and shall issue and cause
3 to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition."

Under the Clayton Act the proceeding can be brought only in the judicial district of which the respondent is an inhabitant or wherever it may be found. This proceeding was not so brought.

5. The plaintiff (formerly Standard Fashion and New Idea Pattern Cos.) and the other respondents named in the foregoing complaint filed their answers to said complaint within due time. A copy of the answer of the plaintiff (then Standard Fashion Co. and New Idea Pattern Company) is hereto annexed, marked "Exhibit B" and by reference made a part hereof with the same force and effect as if herein set forth in full. The answers of the respondents, Standard Fashion Company and New Idea Pattern Company were similar to the answer of the plaintiff, and the answers of the respondents, Butterick Company and Federal Publishing Company, after denying the allegations of the complaint in counts 1 and 2, so far as they relate to these respondents, allege that the Butterick Company and the Federal Publishing Company were not engaged in interstate commerce or transacting any business of the kind described in said counts, and that the defendant was estopped from maintaining the said proceedings against said respondents by the decisions of the federal courts in the cases of the Butterick Company against the United States, and Federal Publishing Company against the United States (240 Fed. 539, s. c. 248 U. S. 587).

6. On or about January 29, 1920, said defendant without notice to the plaintiff or any of the other respondents named in said complaint, made an order joining the proceeding against the plaintiff and the other respondents named in the complaint aforesaid with a proceeding brought by the defendant against the Pictorial Review Company for the purposes of taking testimony; and on or about January 31, 1920, gave notice to the respondents named in the complaint aforesaid, that the taking of testimony in support of
4 the complaint of the defendant in said proceedings, would commence at the City of New York, State of New York, on February 9, 1920.

7. The plaintiff and the other respondents named in the aforesaid complaint gave notice of motions to vacate the said order of joinder and to sever the proceedings as to the several respondents named in the said complaint, and on March 4, 1920, an order was made by the defendant setting said motions down for hearing on March 9, 1920. Thereafter, and on March 16, 1920, defendant made an order vacating and setting aside the said order of joinder; dis-

missing said proceedings so far as they affected the Butterick Company and Federal Publishing Company, and on the defendant's own motion dismissing the second count or cause of action contained in said complaint and severing the said proceeding as to the respondents, The Butterick Publishing Company and New Idea Pattern Company, and that the three severed proceedings proceed at the same time against the said three respondents, but severally.

8. Thereafter the defendant proceeded to take testimony and upon the opening of the hearing made a motion to amend the said complaint, by substantially restoring the said second count which had been dismissed as aforesaid. The respondents objected to the proposed amendment and a hearing was had before the defendant upon the said objection, and on March 30, 1920, said defendant made an order purporting to vacate and set aside the order of March 16, 1920, aforesaid, vacating the order of joinder aforesaid and severing the said proceeding as to all of the respondents, and directing that as so severed the proceeding proceed at the same time against the

respondents but severally. The respondents claimed that
5 the said order of the defendant of March 30, 1920, was without jurisdiction and a hearing was had upon the said objection, and on April 7, 1920, the defendant made an order dismissing the pending complaint against the said respondents and each and all of them without prejudice to the right of the Commission to issue another complaint as the Commission may elect.

9. And on or about May 24, 1920, said defendant served upon the plaintiff, the Butterick Company, Federal Publishing Company, Standard Fashion Company, New Idea Pattern Company and The Butterick Publishing Company, another complaint, a copy of which is hereto attached, marked "Exhibit C" and by reference made a part hereof, with the same force and effect as if set out herein in full.

10. Said defendant in issuing the complaint, "Exhibit C," pretended to be acting under and pursuant to the terms of the aforesaid Federal Commission Act and to derive its authority to require the plaintiff and the other respondents named in said complaint, "Exhibit C" to file answers thereto solely and exclusively from said Act and especially from Section 5 thereof, hereinbefore quoted.

11. The plaintiff in due time filed its answer to said complaint, "Exhibit C," a copy whereof is hereto attached marked "Exhibit D" and by reference made a part hereof with the same force and effect as if herein set forth in full (being included in the verification of this bill of complaint). The other respondents named in the complaint "Exhibit C," except the Standard Fashion Company and
6 the New Idea Pattern Company which had been consolidated into the plaintiff and had ceased to do business prior to the institution of said proceeding, also, filed answers to said complaint, "Exhibit C"; that of The Butterick Publishing Company being substantially identical to that of the plaintiff, and setting up the fact of the consolidation aforesaid, and that the respondents Standard Fashion Company and New Idea Pattern Company had ceased to do business as such prior to the time of the institution of

said proceeding; and the respondents, the Butterick Company and the Federal Publishing Company in their answers denying the allegations of the complaint, "Exhibit C," so far as they affect them, and set up lack of jurisdiction on the part of the Federal Trade Commission, for the reason that the respondents, Butterick Company and Federal Publishing Company, were not doing business within the meaning of the Federal Trade Commission Act; that the Commission was estopped from proceeding by the aforesaid decisions of the federal courts; and that the complaint failed to state facts sufficient to constitute either unfair competition under Section 5 of the said Act, or violation of Section 3 of the Clayton Act.

12. On or about July 16, 1920, said defendant served notice upon the plaintiff and the other respondents named in the complaint, "Exhibit C" that it would begin the taking of testimony in support of said complaint at the offices of the Federal Trade Commission in the City of Washington on July 26th, 1920, at 10:30 o'clock A. M. When the answers of the several respondents in the complaint, "Exhibit C" were filed, a request was made of the Chief Counsel for the defendant, that he consider the answers and if necessary request a Commissioner or Commissioners to consider them, with a view of determining whether the public interest required further proceeding. On receiving the notice to take testimony a

7 further written request was made of said Counsel and of the Commission that the answers be examined to determine whether any question of fact remained as to which testimony should be taken, or whether the sole question remaining was a question of law as to which the Commission had no jurisdiction, and in view of the notice to take testimony an early response was requested. On July 20, 1920, no answer having been received, the defendant was communicated with and the plaintiff's counsel were advised that no action had been taken. Thereupon notices of motions to dismiss the complaint, "Exhibit C" as to respondents, Butterick Company and Federal Publishing Company, on the ground that they were not transacting business within the meaning of the Federal Trade Commission Act, and that the complaint did not state facts sufficient to constitute a cause of action; to dismiss the proceeding as to the respondents, Standard Fashion Company and New Idea Pattern Company, on the ground that they had been consolidated into the plaintiff and had ceased to do business prior to the institution of the proceeding, and on the ground that the complaint fails to state facts sufficient to constitute a cause of action, and to sever the proceeding as to the respondents, the plaintiff and The Butterick Publishing Company, or to dismiss as to them on the ground that the complaint failed to state facts sufficient to constitute a cause of action. These motions came on to be heard before the Commission on July 28, 1920.

13. The plaintiff claims and shows that said defendant, the Federal Trade Commission, has no authority, power or jurisdiction to prosecute the proceeding instituted by the complaint, "Exhibit C," and that the plaintiff is not required by law to submit to the ex-

amination into its affairs by said defendant which is proposed
8 under the said complaint for the reasons hereinafter set forth.

14. The said defendant, the Federal Trade Commission, is an administrative body created by statute and is without power or authority after once dismissing a proceeding charging the plaintiff with unfair competition under section 5 of the Federal Trade Commission Act and with violating section 3 of the Clayton Act to institute a now proceeding against the plaintiff making the same charges without alleging or there being any new facts to sustain said charges.

15. On information and belief that no complaint has been filed by any customer of the plaintiff before the said defendant nor has any charge or suggestion been made by any such customer that the plaintiff is or may be guilty of unfair methods of competition or has in any way violated any of the provisions of said Federal Trade Commission Act or of any of the so-called anti-trust laws of the United States, including the Act entitled "An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies" approved July 2, 1890, commonly known as the Sherman Law, and the Act entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for Other Purposes," approved October 15, 1914, commonly known as the Clayton Law.

The effect of the prosecution of the said proceeding under the said complaint against the plaintiff will not throw any light or have any bearing on any possible violation of any of the Acts aforesaid, and would only encourage competitors of the plaintiff to increase
9 their attempts to induce customers of the plaintiff to break their contracts with plaintiff and their other unfair practices and to create unrest and suspicion among the customers of the plaintiff as to its business practices.

16. The plaintiff (as Standard Fashion Company and New Idea Pattern Co.) has for over fifty years conducted its business in the same manner as it does now and its contracts with its agents have contained the same provisions that agents should not sell plaintiff's patterns except at label prices and that plaintiff's agents should not sell or permit to be sold on the premises where the agency was conducted any other make of pattern, the provisions which form the basis of the proceeding by the said defendant, and during the said period all of plaintiff's competitors have come into being, developed and now have about 85 per cent of the pattern agencies throughout the United States including many of the largest merchants in the great cities.

17. An examination of the pleadings will show that there is no question of fact and that the only question involved is one of law, that is whether the plaintiff's contracts are invalid under section 3 of the Clayton Law, and of this the said defendant, the Federal Trade Commission, had no jurisdiction under the Federal Trade Commission Act.

18. The fact is that no evidence of unfair methods of trade competition can be found, and the only evidence defendant intends to

introduce is to the effect that plaintiff has insisted upon the observance of its contracts including the provisions as to not selling except at label prices and not selling, or permitting to be sold, on the premises where the agency is conducted any other make of patterns.

10 After the defendant, as hereinbefore stated, of its own motion dismissed the second count in the complaint, "Exhibit A," counsel for the defendant admitted that it was useless to attempt to proceed with the taking of testimony because there was no evidence of any unfair methods of competition alleged in the first count of said complaint, and for this reason counsel for defendant attempted to restore the said second count by amendment.

19. The complaint does not state the proportion of the pattern business of the country controlled by the plaintiff or by the plaintiff and the other respondents named in complaint "Exhibit C," it is not alleged that the plaintiff, or the plaintiff and the other respondents held a monopoly of the pattern business or had ability, purpose or intent to acquire one, nor is anything alleged which would justify the conclusion that the public suffered injury or that competitors had reasonable ground for complaint; and it does appear that the plaintiff undertakes to distribute to the public its lawfully acquired property in the ordinary course, without deception, misrepresentation or oppression, and at fair prices, to purchasers willing to take it upon terms openly announced.

20. The pleadings show that there is no lessening of competition in the pattern business and that there is no public interest involved.

21. The pleadings in the proceeding before the defendant show that there are numerous pattern companies independent of and not connected with the plaintiff and the other respondents named in the complaint "Exhibit C," and there is no claim or allegation of any combination or joint action between said pattern companies or between plaintiff and said pattern companies or any of them.

11 22. The complaint alleges that the Butterick Company owns all the stock of the Federal Publishing Company and that the Federal Publishing Company owns all the stock of the plaintiff; but there is no allegation that said companies or any of them have common directors or officers.

23. There is no claim or allegation in the complaint that the plaintiff's patterns are a natural monopoly or that other patterns supplying the place of plaintiff's are not readily obtainable, or that plaintiff's patterns are not readily obtainable at fair prices.

24. The plaintiff will be subjected to substantial and unnecessary expense and loss in defending the said proceeding and in the publication of the fact that such a proceeding has been brought and is being prosecuted against the plaintiff and by the use which will be made of said proceeding by the competitors of the plaintiff as long as the said proceeding is pending.

25. The plaintiff has no adequate remedy at law in the premises and is remediless except in equity and that only by the interposition of this court of equity and the granting of an injunction against the further proceeding by the said defendant, the Federal Trade Com-

mission, under the said complaint, "Exhibit C," can the plaintiff secure the relief to which it is entitled in the premises and protection from the great and irreparable wrongs threatened by the said defendant.

Wherefore the plaintiff prays that, upon the filing of this bill, a temporary or interlocutory order may be entered herein
 12 restraining said defendant, the Federal Trade Commission, its members, agents, assistants, deputies and employes from proceeding further under the said complaint "Exhibit C," and that, upon the final hearing of this cause, a decree may be entered herein directing the said defendant, the Federal Trade Commission, to dismiss the said complaint "Exhibit C," and all proceedings thereunder perpetually enjoining further proceedings under the said complaint and perpetually enjoining the said commission, its members, agents, assistants, deputies, employes, servants and representatives from further proceeding under the said complaint.

And the plaintiff further prays that such other and further relief be granted in the premises as equity and justice may require.

And the plaintiff further prays that a writ of subpoena of the United States of America may issue directed to said Federal Trade Commission, commanding said Commission on a certain day and under a certain penalty, therein to be specified, personally to be and appear before this Honorable Court and then and there full true and complete answer to make to all and singular the matters aforesaid, but not under oath (answer under oath being hereby expressly waived) and to stand to and abide by such order and decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

THE DESIGNER PUBLISHING CO., INC.,
 By JOHN T. SCANLON,

Pres.

NOBLE, MORGAN & SCAMMELL,

Attorneys for the Plaintiff.

HERBERT NOBLE,
 JAMES B. SHEEHAN,
 HARTWELL P. HEATH,

Of Counsel.

13 STATE OF NEW YORK,
County of New York, ss:

On this 27th day of July, 1920, before me personally appeared John T. Scanlon the president of the above named plaintiff, who made solemn oath that he had read the foregoing bill of complaint subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN T. SCANLON.

Sworn to before me this 27th day of July, 1920.

[Notarial Seal.]

A. P. SCHOEN,
Notary Public, 75, New York County.

14

EXHIBIT A.

UNITED STATES OF AMERICA, ss:

Before Federal Trade Commission.

At a Regular Session of the Federal Trade Commission Held at Its Office, in the City of Washington, D. C., on the 24th Day of March, A. D. 1919.

Present:

William B. Colver,
Chairman;
John Franklin Fort,
Victor Murdock,
Huston Thompson,
Commissioners.

Docket No. 265.

FEDERAL TRADE COMMISSION

vs.

BUTTERICK COMPANY, FEDERAL PUBLISHING COMPANY, STANDARD Fashion Company, Butterick Publishing Company, and New Idea Pattern Company.

Complaint in the Matter of the Alleged Violation of Section 5 of an Act of Congress Approved September 26, 1914, and of Section 3 of an Act of Congress Approved October 15, 1914.

I.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it, that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company, the Butterick Publishing Company, and the New Idea Pattern Company, hereinafter referred to as the respondents, have been and now are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint stating its charges in that respect upon information and belief as follows:

Paragraph One. That the respondents, the Butterick Company,

Federal Publishing Company, Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, and each of them, are corporations organized and existing under the laws of the State of New York, and that each of said corporations has its principal office and place of business in the City of New York, in the State of New York; that for more than a year last past the respondents, Butterick Company and Federal Publishing Company through respondents, Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, have been engaged and are now engaged at said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other states of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

15 Paragraph Two. That since the year 1900 all of the shares of capital stock issued by respondents, Butterick Publishing Company and Standard Fashion Company, have been owned and controlled by respondent, Federal Publishing Company and now are so owned and controlled; that since the year 1902 all of the shares of capital stock issued by respondents, New Idea Pattern Company and Federal Publishing Company have been owned and controlled by respondent, Butterick Company, and now are so owned and controlled; that respondents, Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce as aforesaid, and in the course of such business, are operated, directed and controlled by respondents, Federal Publishing Company and Butterick Company as subsidiaries thereof; that respondents, Federal Publishing Company and Butterick Company, were organized and exist for the sole purpose of holding the stock of said other respondents and of operating, directing and controlling said other respondents as subsidiaries in the manner aforesaid.

Paragraph Three. That the business of manufacturing and selling paper dress patterns for garments worn by women and children, constitutes a large and important branch of commerce among the states of the United States; that such patterns are peculiarly adapted to distribution to the purchasing public through the medium of retail dry goods stores, and that substantially the entire output of such patterns in the United States is so distributed; that said patterns are carried as staple articles of trade in upwards of fifty thousand retail dry goods stores in the United States; that numerous persons and corporations are engaged in the manufacture and sale of such patterns in competition with respondents.

Paragraph Four. That in the course of their business and for more than a year last past respondents have maintained a practice of prescribing the price at which all patterns manufactured by respondents must be resold by retail dealers to the purchasing public; that in pursuance of said practice respondents have entered into contracts

with approximately twenty thousand retail dry goods dealers throughout the United States for the sale to said dealers of paper dress patterns upon the express condition, agreement and understanding in each contract that the dealer named therein shall resell such patterns only at the labeled price thereof prescribed by respondents as aforesaid; that the effect produced by respondents' said practice of prescribing and maintaining resale prices is to secure to respondents the trade of retail dealers and to enlist the active co-operation of such dealers in enlarging the sale of patterns manufactured by respondents; that the further effect of respondents' said practice is to eliminate competition in prices among dealers who sell respondents' patterns and to deprive such dealers of the power to determine the resale price of said patterns; that for the purpose of compelling dealers to maintain and observe the prescribed prices aforesaid, respondents for more than a year last past have refused and now refuse to sell patterns to dealers who will not agree to conform to said resale prices prescribed by respondents.

16

II.

The Federal Trade Commission having reason to believe, from a preliminary investigation made by it, that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company, the Butterick Publishing Company and the New Idea Pattern Company hereinafter referred to as the respondents, have been and now are violating the provisions of Section 3 of an Act of Congress, approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," issues this complaint, stating its charges in that respect on information and belief as follows:

Paragraph One. That the respondents, Butterick Company, Federal Publishing Company, Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, and each of them, are corporations, organized and existing under the laws of the State of New York, and that each of said corporations has its principal office and place of business in the City of New York, in the State of New York; that for more than a year last past the respondents, Butterick Company and Federal Publishing Company through respondents, Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, have been engaged, and now are engaged in said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other states of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

Paragraph Two. That since the year 1900 all of the shares of capital stock issued by respondents, Butterick Publishing Company and Standard Fashion Company, have been owned and controlled

by respondent, Federal Publishing Company and now are so owned and controlled; that since the year 1902 all of the shares of capital stock issued by respondents, New Idea Pattern Company and Federal Publishing Company have been owned and controlled by respondent, Butterick Company and now are so owned and controlled; that respondents Butterick Publishing Company, Standard Fashion Company and New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce as aforesaid, and in the course of such business, are operated directed and controlled by respondents, Federal Publishing Company and Butterick Company as subsidiaries thereof; that respondents, Federal Publishing Company and Butterick Company, were organized and exist for the sole purpose of holding the stock of said other respondents and of operating, directing and controlling said other respondents as subsidiaries in the manner aforesaid.

Paragraph Three. That the business of manufacturing and selling paper dress patterns for garments worn by women and children, constitutes a large and important branch of commerce among the states of the United States; that such patterns are peculiarly adapted to distribution to the purchasing public through the medium of retail dry goods stores and that substantially the entire output of such patterns in the United States is so distributed; that said patterns are carried as staple articles of trade in upwards of fifty thousand retail dry goods stores in the United States; that numerous persons and corporations are engaged in the manufacture and sale of such patterns in competition with respondents.

17 Paragraph Four. That for more than a year last past, respondents, in the course of their business aforesaid, have adopted and maintained a practice of selling paper dress patterns for garments worn by women and children, to retail dealers only on condition that such dealers refrain from selling patterns manufactured by any competitor of respondents; that in the course of said practice respondents have entered into contracts with approximately twenty thousand retail dry goods dealers for the sale to said dealers of paper dress patterns together with periodical matter pertaining thereto, for resale within the United States, at prices, in quantities and for periods therein specified, upon the express condition, agreement and understanding, in each contract, that the dealer named therein shall not deal in patterns other than those manufactured by one of the respondents therein named; that in numerous instances retail dealers have attempted to deal in patterns other than those manufactured by respondent in disregard of the condition, agreement and understanding aforesaid, and that respondents, for the purpose of compelling performance thereof, have threatened to furnish no more patterns to such dealers under existing contracts and to institute legal proceedings against such dealers to enforce performance thereof, and for the payment of damages; and that respondents in numerous instances have carried out such threats by actually ceasing to furnish patterns and by so instituting legal proceedings for the purposes aforesaid; that the said dealers who have contracted with the respondents for the purchase

of patterns on the condition, agreement and understanding aforesaid, constitute a large proportion of the total number of retail dry goods dealers in the United States, and include in many cities and towns each and all of such dealers; that the condition, agreement and understanding in the contracts aforesaid, has the effect of excluding and debarring competitors of the respondents from access to a large proportion of the retail dry goods trade in the United States, and of preventing said competitors from selling, or offering for sale, to a large proportion of the purchasing public, patterns manufactured by them in competition with the respondents, and of restraining, hindering and embarrassing such competitors in marketing their patterns in commerce, and of lessening competition therein.

Therefore, notice is hereby given you, the said respondents, and each of you, that the charges of this complaint will be heard by the Federal Trade Commission at its office, 15th and K Streets, N. W., in the City of Washington, D. C., on the 13th day of May, A. D., 1919, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached, at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the Commission an answer in conformity with Rule III of the Rules of Practice before the Commission.

18 In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 24th day of March, A. D. 1919.

By the Commission.

[SEAL.] (Signed) LEONIDAS L. BRACKEN,
Secretary.

(Signed) JOHN WALSH,
Chief Counsel for the Commission.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

No. 265.

FEDERAL TRADE COMMISSION

v.

BUTTERICK COMPANY, FEDERAL PUBLISHING COMPANY, STANDARD Fashion Company, Butterick Publishing Company, and New Idea Pattern Company.

Answer of The Standard Fashion Company.

The Standard Fashion Company, above named, by its attorneys, Noble, Morgan & Scammell, and James B. Sheehan, answering the complaint in the above entitled proceeding, respectfully shows:

I.

Paragraph One. That this respondent denies each and every allegation with respect to it contained in Paragraph One of the first alleged charge contained in said complaint, in so far as the said allegations purport to charge directly or indirectly any of the matters and things contained in said paragraph against this respondent, except that it admits that it is a corporation organized and
20 existing under the laws of the State of New York, with its principal office and place of business in the City of New York; and this respondent denies that for more than a year last past the respondents, The Butterick Company and The Federal Publishing Company, through respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, have been engaged, and now are engaged in said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other States of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

Paragraph Two. This respondent admits that since the year 1900, all or practically all of the shares of capital stock issued by the respondents, The Butterick Publishing Company and The Standard Fashion Company, have been owned by the respondent, The Federal Publishing Company, and are now so owned; that since the year 1902 all or practically all of the shares of capital stock issued by the respondents, The New Idea Pattern Company and The Federal Pub-

lishing Company, have been owned by respondent, The Butterick Company and are now so owned, and that respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce; and this
21 respondent denies each and every other allegation contained in Paragraph Two of the first alleged charge; and alleges that the respondent is separately and competitively with the respondent, Butterick Publishing Company, and respondent, New Idea Pattern Company, as well as with all other pattern companies, actively engaged in the business of manufacturing and selling patterns in commerce throughout the United States.

Paragraph Three. That this respondent denies each and every allegation with respect to it contained in Paragraph Three of said first charge, except that it admits that the business of manufacturing and selling paper dress patterns for garments worn by women and children constitutes a portion of commerce among the states of the United States; that this respondent has approximately six thousand (6,000) agencies for the sale of its patterns throughout the United States; that retail dry goods stores offer certain advantages as such agencies: and that numerous persons and corporations are engaged in the manufacture and sale of paper patterns in competition with this respondent.

Paragraph Four. That this respondent denies each and every allegation with respect to it contained in Paragraph Four of said first charge, in so far as it purports to charge this respondent directly or indirectly with any of the matters and things contained in said paragraph, except that it admits that in the course of its business, and for more than a year last past, this respondent has established agencies for the sale of its patterns under written instruments, containing,
22 among other things, an agreement on the part of such agents not to sell respondent's patterns at less than "label prices," as more particularly set forth hereinafter, and that the manner of conducting the respondent's business is intended to and does secure the active co-operation of such persons as it may select for its agents in enlarging the sale of respondent's patterns; and this respondent denies each and every other allegation contained therein.

Further answering the said first charge, this respondent respectfully shows:

Paragraph Five. That this respondent is engaged in the manufacture and sale of dress patterns for garments worn by women and children, and in the printing and publication of fashion periodicals and catalogues; that the said paper dress patterns so manufactured by this respondent consist of diagrams, designs or construction models, designed to enable persons to make garments for themselves and others, which said diagrams, designs or models are manufactured, for economic reasons, of tissue paper; that said patterns are not "staple articles of trade" (as alleged in said charge) or articles of merchandise, within the meaning of either term; that said patterns are intangible rather than physical in their nature; that their

value depends, not upon the material out of which they are manufactured, but upon the design or style, and the continuance in style of the particular design; that said patterns are issued and sold either through the agencies hereinafter described to the public, or directly to the public, only under the respondent's trademark "Standard Patterns"; that said patterns never lose their identity as "Standard Patterns," whether in the hands of such agents or the public;

23 that this respondent has by a large expenditure of money for advertising created a very valuable good will in its said trade-name and trade-mark; that this respondent for the protection of its good will and trademark guarantees "Standard Patterns" to its customer, that it will make good any loss sustained by its customers in case of any error or imperfection in its patterns; that the salability of said patterns depends upon the continuance in style of the particular fashion of each particular pattern; that said styles frequently change by reason of changes of season, by reason of the character of the material for which the particular design is suitable, and by reason of the desire of women generally for new styles; that said patterns are perishable, in their nature; that, in order to protect the respondent's trademark and good will, the respondent places in the hands of its said agents old styles with new styles of patterns as fast as such styles change; and that, in order to properly market its patterns, this respondent keeps in the hands of its agents, as hereinafter more fully stated, sufficient stocks of patterns to meet the needs of the respective communities and keeps said stocks up to date to meet the desire for the latest styles by constantly changing patterns which go out of style for new ones.

Paragraph Six. That this respondent markets its patterns principally through special agencies for the sale thereof established under contracts in writing, for a definite period of years, under which this respondent supplies to the agent a minimum stock of patterns, for which the agent is required to advance in cash only half its value,

24 as security for the performance of the contract, and agrees to supply such agent with such other patterns as he may require during the term of such agency, to exchange all patterns which go out of style for new styles, and to take back the entire stock of patterns remaining in the agent's hands at the termination of the agency (which stock must not be less than the minimum amount so specified), and under which the agent agrees, among other things, to keep on hand for sale to the public at all times during the term of the agency (except during exchange periods) a stock of respondent's patterns to an amount not less than the minimum stock so specified, to keep the respondent's patterns on the ground floor of the agent's store, to give or cause to be given by a lady attendant proper attention to the sale of respondent's patterns, to conserve the best interests of respondent at all times, not to remove the said pattern stock from its original location, nor to assign it or the agency without the written consent of this respondent, not to sell or permit to be sold on the agent's premises during the term of the agency any other make of patterns, not to sell respondent's patterns except at label

prices, and upon the expiration of the agency to return all patterns then held by such agent; that said patterns are advertised by and sold by said agents to the public as "Standard Patterns," and not otherwise; that respondent guarantees to the purchaser from such agents the perfection of said patterns, and makes good to such purchaser any loss occurring through imperfection or error; that the intent and purpose of said contract is not to sell patterns to the agent, but to sell patterns to the public through such agent; that this respondent retains a property interest in said patterns at all times

25 while they are in the hands of the agent under such contracts; that said agents are clothed with a power only to convey a complete title to said patterns to the purchaser thereof;

that such agent must return all unsold patterns to the respondent; that the effect of such contract is not to require such agents to compete unfairly with respondent's competitors, or with agents of this respondent's competitors, or with other agents of this respondent, and is not to substantially lessen competition or tend to create a monopoly; that this respondent does not place more than one agency in a town or community, except in cities where the population is sufficiently large to make profitable the placing of more than one agency; that in such instances no agency is placed so near another or existing agency as to interfere with or draw from the trade of the latter; that to a considerable extent sales of such patterns are made to the users thereof either directly through its own salesrooms, branch offices or through the mails; that the respondent at all times, during the terms of any such agency, retains a property interest in the patterns furnished to such agent until the said patterns are marketed through such agents to the public; that this respondent exercises a supervision over the stocks of patterns while in the hands of such agents and when such stocks are found to be less than the minimum stock so specified or when such stocks are found not to be assorted as to new styles this respondent reassorts said stocks and fills them in to the amount of such minimum and as to the new styles; that this respondent has at all times during the period of such agency, not only a property interest in the patterns themselves, but an interest in the

26 price at which said patterns shall be sold; that the provision that the agents shall not sell respondent's patterns at less than "label prices" is inserted in said contracts in good faith solely for the protection of respondent's business and not for the purpose of controlling or attempting to control the price at which such patterns shall be sold after this respondent has parted with title thereto; that the sale of respondent's patterns at less than the label price would tend to injure and destroy the value of respondent's trade-mark and good will, and to cheapen the value of its patterns in the estimation of the public; that cutting of the prices of the same would tend also to demoralize the respondent's business and injuriously affect the organization created for the distribution of respondent's patterns; that if respondent were to permit merchants in any given community to cut the prices of its patterns such price cutting would result in reducing the agencies for the sale of re-

spondent's patterns in that particular community to those only engaged in that practice to deprive respondent of the services of other agents who desire to engage in a fair and legitimate conduct of their business and who desire to faithfully perform the conditions of their agency agreements; that respondent could not procure agents for the sale of its patterns in small towns or in towns surrounding large cities in which such merchants cut the price of its patterns; that the terms upon which the compensation of such agents is fixed is at a proportion of the retail price of the patterns and that unless the respondent could insure to the agent the fixed proportion of the retail price of patterns provided in such contracts

for patterns sold through the agent to the public, respondent
27 could not make its contracts with agents for terms of years, and its business would be completely demoralized; that the effect of respondent's practice in fixing in such contracts the retail price at which its agents must sell its patterns, is not to eliminate competition in price among "dealers;" that there are no "dealers" in respondent's patterns in the sense in which said word "dealers" is used in the charge herein; that there are no "dealers" having title to such patterns who are or can be deprived of the power to determine the resale price of such patterns; that said patterns are not sold outright to such agents; that said provision that respondent's patterns shall not be sold at less than "label prices" is contained only in contracts with agents for the sale of respondent's patterns; that there is no competition and can be no competition and no unfair competition in the sense contemplated by the Act of Congress approved September 26, 1914, entitled An Act to create Federal Trade Commission to define its powers and duties and for other purposes," by reason of said provision; that the effect of an order of the Federal Trade Commission requiring the respondent to cease and desist from continuing the clause in its contracts with its agents, by which such agents are required to sell respondent's patterns at not less than "label prices" would not result in preventing unfair competition, but on the contrary would result in enabling one or more of its agents to unfairly compete with other of respondent's agents (who are the *alter ego* of respondent), and to unfairly compete with respondent in its sale of patterns in its own retained business through
its own salesrooms and branch offices and by mail; that re-
28 spondent's contracts with agents for the sale of its patterns in substantially the same terms as hereinabove set forth have been in existence for over thirty years; that the act wrongfully charged against this respondent of refusing to sell its patterns to dealers who will not agree to conform to the retail price prescribed by the respondent, if actually committed by this respondent, would not and could not have the effect of constituting unfair competition, for the reason that if no patterns were sold there could be no competition in the sale thereof; and that respondent has not for a year last past nor at any time refused and does not refuse to sell patterns to dealers or any one else who will not agree to conform to the retail price prescribed by respondent, but imposes that condition only on its agents under contract as aforesaid for the sale of its patterns.

That this respondent has conducted its business in the manner aforesaid under such written contracts for a period of over thirty years and that such contracts were prepared and executed with its agents in good faith for the purpose of advancing and protecting this respondent in its business and not for the purpose of evading or circumventing any statute of the United States of America, or of any of the respective states thereof; and that the said contracts have been adjudicated and decreed to be "a lawful contract duly executed by both the parties thereof * * * capable of performance by both, and * * * no reason for non-performance by either by the courts of last resort in many of the states of the Union, to wit: by the Court of Appeals of the State of New York, than which no state court stands higher, in *Standard Fashion Co. v. Siegel* 29 *Cooper Co.*, 157 N. Y., 60; by the Supreme Court of the Commonwealth of Massachusetts, which has an equal standing with the Court of Appeals of New York, in *Butterick Publishing Co. v. Fisher*, 203 Mass., 122; by the Supreme Court of the State of Wisconsin in *Butterick Publishing Co. v. Rose*, 141 Wis., 553; by the Supreme Court of the State of Michigan in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich., 158, and by the Supreme Court of the State of South Dakota in *Sullivan v. Rime*, 35 S. Dak., 75, and in many other state courts in various states of the United States, and that a similar contract was held to be a contract of agency by the Supreme Court of the United States in *Wilcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S., 627.

That this respondent alleges that Congress never intended either the Sherman Anti-Trust Law nor the Clayton Act to interfere with established modes of business which had existed for so long periods and which were adopted in good faith to protect the business of respondent and not to restrain trade or create a monopoly and which do not injure and were not intended to injure any one.

Paragraph Seven. That respondent's business is conducted wholly independently of any of the other respondents named in the complaint herein, and that none of the acts charged against it has been done in combination with, in conjunction with or under the direction or control of any of the other respondents named herein, or at the suggestion, behest or request of any of the other respondents named herein.

Paragraph Eight. That this respondent denies that for 30 more than a year last past, or at any other time, the respondents, the Butterick Company and the Federal Publishing Company, or either of them, transacted any business of the kind described in the said charge, or of any other kind, through this respondent, or through any of the other respondents named herein; and alleges that the Federal Trade Commission, the complainant herein, is a subdivision of and an integral part of the Government of the United States of America; that in an equity suit brought in the District Court of the United States in and for the Southern District of New York by the said Butterick Company against the said United States of America, it was decided and adjudicated, among other things, that the said Butterick Company was not and had not

been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court for the Southern District of New York on the 8th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon the said United States of America; that in another equity suit brought in the said District Court of the United States in and for the Southern District of New York by the said Federal Publishing Company against the United States of America, it was decided and adjudicated, among other things, that said Fed-

31 eral Publishing Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court of the Southern District of New York on the 7th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon said United States of America, and that by said judgments and each of them the matters herein in litigation were finally adjudicated and settled; that there has been no change in the manner in which this respondent has conducted its business in the respects litigated in said equity suits or either of them since the commencement of and decision of said suits in equity; and that the complainant herein is thereby estopped and debarred from prosecuting this proceeding upon the theory that the said respondents The Butterick Company and the Federal Publishing Company, or either of them, have been engaged or now are engaged in transacting business through this respondent, or any of the other respondents named in the complaint herein.

Paragraph Nine. That the Federal Trade Commission has no jurisdiction over the subject-matter of the said first charge.

II.

Paragraph One. This respondent denies each and every allegation with respect to it, contained in Paragraph One of the second charge contained in the complaint herein, in so far as said allega-
32 tions purport to charge this respondent directly or indirectly with any matters and things contained in said paragraph, except that it admits that it is a corporation organized and existing under the Laws of the State of New York with its principal office and place of business in the City of New York; and this respondent denies that for more than a year last past the respondents, The Butterick Company and The Federal Publishing Company, through

respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company have been engaged, and now are engaged in said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other states of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

Paragraph Two. This respondent admits that since the year 1900, all or practically all of the shares of capital stock issued by the respondents, The Butterick Publishing Company and The Standard Fashion Company, have been owned by the respondent, The Federal Publishing Company, and are now so owned; that since the year 1902 all or practically all of the shares of capital stock issued by the respondents, The New Idea Pattern Company and The Federal Publishing Company, have been owned by respondent, The Butterick Company and are now so owned, and that respondents,

33 The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce; and this respondent denies each and every other allegation contained in Paragraph Two of the first alleged charge; and alleges that it is separately and competitively with the other respondents, Butterick Publishing Company and New Idea Pattern Company and all other pattern companies actively engaged in the business of manufacturing and selling patterns in commerce.

Paragraph Three. That this respondent denies each and every allegation with respect to it, contained in Paragraph Three of said second charge, except that it admits the business of manufacturing and selling paper dress patterns for garments worn by women and children constitutes a portion of commerce among the States of the United States; that it has approximately 6,000 agencies for the sale of its patterns; that retail dry goods stores offer various advantages as such agencies; and that numerous persons and corporations are engaged in the manufacture of such patterns in competition with respondent.

Paragraph Four. This respondent denies each and every allegation with respect to it, contained in Paragraph Four of said second charge, in so far as said allegations purport to charge this respondent directly or indirectly with any of the matters and things contained in said paragraph, except that it admits that for more than a year last past, respondent in the course of its business has established agencies for the sale of its patterns under written instruments containing among other things, on the part of such agents, an agree-

34 ment not to sell or permit to be sold on the premises of such agency, during the term of the agency, any make of patterns other than those manufactured by this respondent as is more fully set forth hereinafter; that this respondent has approximately 6,000 such agencies with whom it has contracts containing said pro-

vision; that in several instances its agents have been induced by competitors to violate the said negative covenant of this respondent's contracts with its agents not to sell or permit to be sold on their said premises any other make of patterns than those manufactured by this respondent; that in several instances this respondent has instituted suits to enforce performance of that provision of its contracts; that in all such instances, except in the cases still pending and undetermined, of which there are only two, the courts have uniformly upheld the validity of said provisions in respondent's contracts and, when requested so to do, have enforced said provisions of said contracts by injunctions restraining such agents from selling or permitting to be sold on their said premises during the term of their contracts with respondent, any make of patterns other than those manufactured by this respondent; that in some few instances, where agents have refused to perform the conditions of their contracts with this respondent, this respondent has terminated the said contract and ceased to furnish such agents with patterns thereunder; and this respondent denies each and every other allegation contained therein.

Further answering said second charge, this respondent respectfully shows:

Paragraph Five. That this respondent is engaged in the manufacture and sale of dress patterns for garments worn by women and children, and in the printing and publication of fashion
35 periodicals and catalogues; that the said paper dress patterns so manufactured by this respondent consist of diagrams, designs or construction models designed to enable persons to make garments for themselves and others, which said diagrams, designs or models are manufactured, for economic reasons, of tissue paper; that said patterns are not "staple articles of trade" (as alleged in said charge) or articles of merchandise, within the meaning of either term; that said patterns are intangible rather than physical in their nature; that their value depends, not upon the material out of which they are manufactured, but upon the design or style, and the continuance in style of the particular design; that said patterns are issued and sold either through respondent's agencies hereinafter described to the public, or directly to the public, only under the respondent's trade-mark "Standard Patterns"; that said patterns never lose their identity as "Standard Patterns," whether in the hands of such agents for the sale of respondent's patterns, or of the public; that this respondent has by a large expenditure of money for advertising created a very valuable good will in its said trade-name and trade mark; that this respondent for the protection of its trade-mark "Standard Patterns" guarantees to the customer, that it will make good any loss sustained by its customer in case of any error or imperfection in the pattern; that the salability of said patterns depends upon the continuance in style of the particular fashion of each particular pattern, and that said styles frequently change by reason of changes of season, by reason of the character of the material for which the particular design is suitable, and by reason of the

36 desire of women generally for new styles; that said patterns are perishable in their nature; that, in order to protect the respondent's said trade-mark and good will, the respondent replaces in the hands of its said agents old styles with new styles of patterns as fast as such styles change; that, in order to properly market its patterns, this respondent keeps in the hands of its agents as hereinafter more fully stated, sufficient stocks of patterns to meet the needs of the respective communities, and keeps said stocks up to date to meet the desire for the latest styles by constantly exchanging patterns which go out of style for new ones.

Paragraph Six. That this respondent markets its patterns principally through special agencies for the sale thereof established under contracts in writing, for a definite period of years under which this respondent supplies to the agent a minimum stock of patterns, for which the agent is required to advance in cash only half its value, as security for the performance of the contract, and agrees to supply such agent with such other patterns as he may require during the term of such agency, to exchange all patterns which go out of style for newer styles, and to take back the stock of patterns remaining in the agents hands at the termination of the agency (which stock must not be less than the minimum amount so specified), and under which the agent agrees, among other things, to keep on hand for sale to the public at all times during the term of the agency (except during exchange periods), a stock of respondent's patterns to an amount not less than the minimum so specified, to keep the patterns on the ground floor of the agent's building, to give or cause to be given by a lady attendant proper attention to the sale of respondent's patterns, to conserve the

37 best interests of respondent at all times, not to remove the said pattern stock from its original location, nor to assign it or the agency without the written consent of this respondent, not to sell or permit to be sold on the agent's premises during the term of the agency, any other makes of patterns, not to sell respondent's patterns except at label prices, and upon the expiration of the agency to return all patterns then held by such agent; that said patterns are advertised by and sold by said agents to the public as "Standard Patterns" and not otherwise; that respondent guarantees to the purchaser from such agents the perfection of said patterns, and makes good to such purchaser any loss occurring through imperfection or error; that the intent and purpose of said contract is not to sell patterns to the agent, but to sell patterns to the public through such agent; that the effect of said contract is not to lease or sell said patterns to said agent; that this respondent retains a property interest in said patterns at all times while they are in the hands of the agent under such contracts; that said agents are clothed with a power only to convey a complete title to the purchaser thereof; that such agent must return all unsold patterns to this respondent; that the effect of such contract is not to substantially lessen competition or tend to create a monopoly; that this respondent does not place more than one agency in a town or community, except in cities where the population is sufficiently large to make profitable the plac-

ing of more than one stock of patterns on the conditions hereinbefore mentioned; that in such instances no agency is placed so near another or existing agency as to interfere with or draw from the trade

of the latter; that the effect of the provision in respondent's
38 contracts by which such agent covenants not to sell or permit to be sold any make of patterns other than those of the respondent, is to free and make available all the competitors of the respondent's agents to sell, or to act as agents for the sale of the patterns of respondent's competitors; that the effect of said provision, furthermore, is to prevent this respondent from establishing an agency for the sale of its patterns with any merchant who is handling the patterns of any of respondent's competitors; that except in very large department stores it would be unprofitable for any agent to undertake to handle two or more patterns, as the amount of space to be devoted to the sale of such patterns in his store, the amount of money deposited, the amount of help and the amount of advertising necessary to conduct such additional agency or agencies would be increased in proportion to the number of patterns handled; that if each merchant acted as agent for the sale of more than one pattern, the total sales of patterns by all agents in any given community would not exceed the total sales of all patterns if the respective agents each only handled one pattern; that the expenses of each such agent handling more than one pattern would be increased in proportion to the number of patterns handled; that the losses to the manufacturer through exchanges and returns would be increased correspondingly; that the said patterns are not furnished to the agent at any definitely fixed price, but the price which the agent pays for such patterns as are sold by him depends upon the quantity of patterns which are exchanged or returned, which can be definitely

determined only at the termination of the agency; that the
39 more patterns each agent sells without exchange, the less said patterns cost said agent and this respondent, and that the more patterns which said agents exchange the greater the cost to the said agent of such patterns as are sold and the greater the cost to this respondent; that the purpose of the provision requiring such agents not to sell or permit to be sold on their premises any make of patterns other than those manufactured by this respondent, is to increase the number of respondent's patterns sold through such agents to the public, and to lessen the number of patterns to be returned to the respondent by such agents; that the sale of competing patterns in the same store by the same agent tends to prevent such agents from conserving the best interests of the agency for the sale of this respondent's patterns, and not alone to reduce the number of respondent's patterns sold by such agents, but to increase the number of patterns returned to this respondent; that during the term of such contracts patterns which go out of style are exchangeable by such agents for new and more saleable patterns, as already stated; that the effect of permitting an agent to sell competing patterns, would not alone be to reduce the number of sales to the public of respondent's patterns but to increase the number of patterns returned by such agents to the respondent for exchange during

the term of the contract; that the risk of sale of respondent's patterns under the terms of said contracts is substantially borne by this respondent; that the placing of two or more agencies for the sale of respondent's patterns in a town or a community where the demand is not sufficient to warrant the placing on sale of two or more suffi-

40 cient stocks of patterns would result in loss to this respondent, in that it would require respondent to exchange or take back substantially double the quantity of patterns which would be required for the conduct of one agency in such town or community; that the respondent does not place two such agencies in a community under such circumstances; that the said condition contained in the said contracts by which said agents agree not to sell or permit to be sold during the term of the agency any make of patterns other than those of respondent has been contained in respondent's contracts of agency for over thirty years; that the provision that such agents shall not sell or permit to be sold any make of patterns other than those of the respondent is inserted in said contracts in good faith solely for the protection of respondent's business and not for the purpose of restraining trade or for the purpose of engrossment of or securing a monopoly by this respondent of the pattern business or of any substantial part thereof; that said condition has not resulted in the engrossment or monopoly on the part of this respondent of the pattern business or of any substantial part thereof; that said condition affects only the agencies or avenues for distribution of respondent's patterns to the public, and that although said condition has been contained in respondent's contracts for the said period of over thirty years, all of this respondent's competitors except the Butterick Publishing Company have come into being, developed and progressed while said condition was in effect, to the extent that said competitors now engross and control at least eighty-eight per cent of the pattern agencies or avenues for distribution of patterns in the United States;

41 that the contracts above described are made only with agents for the sale of respondent's patterns; and that respondent sells its patterns through its own salesrooms and branch offices and by mail to all others without agreement or restriction of any kind.

That this respondent has conducted its business in the manner aforesaid under such written contracts for a period of over thirty years and that such contracts were prepared and executed with its agents in good faith for the purpose of advancing and protecting this respondent in its business and not for the purpose of evading or circumventing any statute of the United States of America, or of any of the respective states thereof and that the said contracts have been adjudicated and decreed to be "a lawful contract duly executed by both the parties thereof * * * capable of performance by both, and * * * no reason for non-performance by either" by the courts of last resort in many of the states of the Union, to wit, by the Court of Appeals of the State of New York, than which no state court stands higher, in *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60; by the Supreme Court of the Com-

monwealth of Massachusetts, which has an equal standing with the Court of Appeals of New York, in *Butterick Publishing Co. v. Fisher*, 203 Mass., 122; by the Supreme Court of the State of Wisconsin in *Butterick Publishing Co., v. Rose*, 141 Wis., 553; by the Supreme Court of the State of Michigan in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich., 158, and by the Supreme Court of the State of South Dakota in *Sullivan v. Rime*, 35 S. Dak. 75, and in many other state courts in various states of the United States, and that a similar contract was held to be a contract of agency by the Supreme Court of the United States in *Wilcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S., 627.

That this respondent alleges that Congress never intended either the Sherman Anti-Trust Law nor the Clayton Act to interfere with established modes of business which had existed for so long periods and which were adopted in good faith to protect the business of respondent and not to restrain trade or create a monopoly and which do not injure and were not intended to injure any one.

Paragraph Seven. That the business of this respondent is conducted wholly independently of any of the other respondents named in the complaint herein, and that none of the acts charged against it has been done in combination with, in conjunction with, or under the direction or control or at the suggestion, behest or request of any of the other respondents herein.

Paragraph Eight. That this respondent denies that for more than a year last past, or at any other time, the respondents, the Butterick Company and the Federal Publishing Company, or either of them, transacted any business of the kind described in the said charge, or of any other kind, through this respondent, or through any of the other respondents named therein; and alleges that the Federal Trade Commission, the complainant herein, is a subdivision of and an integral part of the government of the United States of America; that in an equity suit brought in the District Court of the United States in and for the Southern District of New York by the said Butterick Company against the said United States of America, it was

43 decided and adjudicated, among other things, that the said the Butterick Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of said District Court for the Southern District of New York, on the 8th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon the said United States of America; that in another equity suit brought in the said District Court of the United States in and for the Southern District of New York by the said Federal Publishing Company against the United States of America, it was decided and adjudicated, among other things, that said Federal Publishing Company was not and has not been transacting business

through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court of the Southern District of New York on the 7th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon said United States of America, and that by said judgments and each

44 of them the matters herein in litigation were finally adjudicated and settled; that there has been no change in the manner in which this respondent has conducted its business in the respects litigated in said equity suits or either of them since the commencement of and decision of said suits in equity; and that the complainant herein is thereby estopped and debarred from prosecuting this proceeding upon the theory that the said respondents, The Butterick Company and the Federal Publishing Company, or either of them, have been engaged or now are engaged in transacting business through this respondent, or any of the other respondents named in the complaint herein.

Wherefore, this respondent respectfully asks that the said complaints against it be dismissed.

NOBLE, MORGAN & SCAMMELL,
JAMES B. SHEEHAN,
Attorneys for the Respondent
The Standard Fashion Company.

115 Broadway, New York City.

CHARLES E. HUGHES,
Of Counsel.

45 STATE OF NEW YORK,
County of New York, ss:

Charles E. Stretch being duly sworn, deposes and says that he is Treasurer of the respondent herein, The Standard Fashion Company, and resides in New York City; that he has read and knows the contents of the foregoing answer and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

CHARLES E. STRETCH.

Sworn to before me this 19th day of June, 1919.

A. P. SCHOEN,
Notary Public, No. 75, New York County.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

No. 265.

FEDERAL TRADE COMMISSION

v.

BUTTERICK COMPANY, FEDERAL PUBLISHING COMPANY, STANDARD Fashion Company, Butterick Publishing Company, and New Idea Pattern Company.

Answer of The New Idea Pattern Company.

The New Idea Pattern Company, above named, by its attorneys, Noble, Morgan & Scammell, and James B. Sheehan, answering the complaint in the above entitled proceeding, respectfully shows:

I.

Paragraph One. That this respondent denies each and every allegation with respect to it contained in Paragraph One of the first alleged charge contained in said complaint, in so far as the said allegations purport to charge directly or indirectly any of the matters and things contained in said paragraph against this respondent, except that it admits that it is a corporation organized and
47 existing under the laws of the State of New York, with its principal office and place of business in the City of New York; and this respondent denies that for more than a year last past the respondents, The Butterick Company and The Federal Publishing Company, through respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, have been engaged, and now are engaged in said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other States of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

Paragraph Two. This respondent admits that since the year 1900, all or practically all of the shares of capital stock issued by the respondents, The Butterick Publishing Company and The Standard Fashion Company, have been owned by the respondent, The Federal Publishing Company, and are now so owned; that since the year 1902 all or practically all of the shares of capital stock issued by the respondents, The New Idea Pattern Company and The Fed-

eral Publishing Company, have been owned by respondent, The Butterick Company and are now so owned, and that respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce; and this respondent denies each and every other allegation contained in Paragraph Two of the first alleged charge; and alleges that the respondent is separately and competitively with the respondent, Standard Fashion Company, and respondent, Butterick Publishing Company, as well as with all other pattern companies, actively engaged in the business of manufacturing and selling patterns in commerce throughout the United States.

48 Paragraph Three. That this respondent denies each and every allegation with respect to it contained in Paragraph Three of said first charge, except that it admits that the business of manufacturing and selling paper dress patterns for garments worn by women and children constitutes a portion of commerce among the states of the United States; that this respondent has approximately four thousand (4,000) agencies for the sale of its patterns throughout the United States; that retail dry goods stores offer certain advantages as such agencies; and that numerous persons and corporations are engaged in the manufacture and sale of paper patterns in competition with this respondent.

Paragraph Four. That this respondent denies each and every allegation with respect to it contained in Paragraph Four of said first charge, in so far as it purports to charge this respondent directly or indirectly with any of the matters and things contained in said paragraph, except that it admits that in the course of its business, and for more than a year last past, this respondent has established agencies for the sale of its patterns under written instruments, containing, among other things, an agreement on the part of
49 such agents not to sell respondent's patterns at less than "label prices," as more particularly set forth hereinafter; and that the manner of conducting the respondent's business is intended to and does secure the active co-operation of such persons as it may select for its agents in enlarging the sale of respondent's patterns; and this respondent denies each and every other allegation contained therein.

Further answering the said first charge, this respondent respectfully shows:

Paragraph Five. That this respondent is engaged in the manufacture and sale of dress patterns for garments worn by women and children, and in the printing and publication of fashion periodicals and catalogues; that the said paper dress patterns so manufactured by this respondent consist of diagrams, designs or construction models, designed to enable persons to make garments for themselves and others, which said diagrams, designs or models are manufactured, for economic reasons, of tissue paper; that said patterns are not "staple articles of trade" (as alleged in said charge) or articles of merchandise, within the meaning of either term; that

said patterns are intangible rather than physical in their nature; that their value depends, not upon the material out of which they are manufactured, but upon the design or style, and the continuance in style of the particular design; that said patterns are issued and sold either through the agencies hereinafter described to the public, or directly to the public, only under the respondent's trademark

50 "New Idea Patterns"; that said patterns never lose their identity as "New Idea Patterns," whether in the hands of such agents or the public; that this respondent has by a large expenditure of money for advertising created a very valuable good will in its said trade-name and trade-mark; that this respondent for the protection of its good will and trademark guarantees "New Idea Patterns" to its customer, that it will make good any loss sustained by its customers in case of any error or imperfection in its patterns; that the salability of said patterns depends upon the continuance in style of the particular fashion of each particular pattern; that said styles frequently change by reason of changes of season, by reason of the character of the material for which the particular design is suitable, and by reason of the desire of women generally for new styles; that said patterns are perishable in their nature; that, in order to protect the respondent's trademark and good will, the respondent replaces in the hands of its said agents old styles with new styles of patterns as fast as such styles change; and that, in order to properly market its patterns, this respondent keeps in the hands of its agents, as hereinafter more fully stated, sufficient stocks of patterns to meet the needs of the respective communities and keeps said stocks up to date to meet the desire for the latest styles by constantly changing patterns which go out of style for new ones.

Paragraph Six. That this respondent markets its patterns principally through special agencies for the sale thereof established under contracts in writing, for a definite period of years, under which this respondent supplies to the agent a minimum stock of patterns, for which the agent is required to advance in cash only half its
51 value, as security for the performance of the contract, and agrees to supply such agent with such other patterns as he may require during the term of such agency, to exchange all patterns which go out of style for new styles, and to take back the entire stock of patterns remaining in the agent's hands at the termination of the agency (which stock must not be less than the minimum amount so specified), and under which the agent agrees, among other things, to keep on hand for sale to the public at all times during the term of the agency (except during exchange periods) a stock of respondent's patterns to an amount not less than the minimum stock so specified, to keep the respondent's patterns on the ground floor of the agent's store, to give or cause to be given by a lady attendant proper attention to the sale of respondent's patterns, to conserve the best interests of respondent at all times, not to remove the said pattern stock from its original location, nor to assign it or the agency without the written consent of this respondent, not to sell or permit to be sold on the agent's premises during the term of the agency any other make of patterns, not to sell respondent's pat-

terns except at label prices, and upon the expiration of the agency to return all patterns then held by such agent; that said patterns are advertised by and sold by said agents to the public as "New Idea Patterns," and not otherwise; that respondent guarantees to the purchaser from such agents the perfection of said patterns, and makes good to such purchaser any loss occurring through imperfection or error; that the intent and purpose of said contract is not to sell patterns to the agent, but to sell patterns to the public through

52 such agent; that this respondent retains a property interest in said patterns at all times while they are in the hands of the agent under such contracts; that said agents are clothed with a power only to convey a complete title to said patterns to the purchaser thereof; that such agent must return all unsold patterns to the respondent; that the effect of such contract is not to require such agents to compete unfairly with respondent's competitors, or with agents of this respondent's competitors, or with other agents of this respondent, and is not to substantially lessen competition or tend to create a monopoly; that this respondent does not place more than one agency in a town or community, except in cities where the population is sufficiently large to make profitable the placing of more than one agency; that in such instances no agency is placed so near another or existing agency as to interfere with or draw from the trade of the latter; that to a considerable extent sales of such patterns are made to the users thereof either directly through its own salesrooms, branch offices or through the mails; that the respondent at all times, during the terms of any such agency, retains a property interest in the patterns furnished to such agent until the said patterns are marketed through such agents to the public; that this respondent exercises a supervision over the stocks of patterns while in the hands of such agents and when such stocks are found to be less than the minimum stock so specified or when such stocks are found not to be assorted as to new styles this respondent reassorts said stocks and fills them in to the amount of such minimum and as to the new styles; that this respondent has at all times during the period of such agency, not only a property interest in the patterns themselves, but an interest in the price at which said patterns

53 shall be sold; that the provision that the agents shall not sell respondent's patterns at less than "label prices" is inserted in said contracts in good faith solely for the protection of respondent's business and not for the purpose of controlling or attempting to control the price at which such patterns shall be sold after this respondent has parted with title thereto; that the sale of respondent's patterns at less than the label price would tend to injure and destroy the value of respondent's trade-mark and good will, and to cheapen the value of its patterns in the estimation of the public; that cutting of the prices of the same would tend also to demoralize the respondent's business and injuriously affect the organization created for the distribution of respondent's patterns; that if respondent were to permit merchants in any given community to cut the prices of its patterns such price cutting would result in reducing the agencies for the sale of respondent's patterns in that

particular community to those only engaged in that practice, and to deprive respondent of the services of other agents who desire to engage in a fair and legitimate conduct of their business and who desire to faithfully perform the conditions of their agency agreements; that respondent could not procure agents for the sale of its patterns in small towns or in towns surrounding large cities in which such merchants cut the price of its patterns; that the terms upon which the compensation of such agents is fixed is at a proportion of the retail price of the patterns and that unless the respondent could insure to the agent the fixed proportion of the retail price of patterns

54 provided in such contracts for patterns sold through the agent to the public, respondent could not make its contracts with agents for terms of years, and its business would be completely demoralized; that the effect of respondent's practice in fixing in such contracts the retail price at which its agents must sell its patterns, is not to eliminate competition in price among "dealers;" that there are no "dealers" in respondent's patterns in the sense in which said word "dealers" is used in the charge herein; that there are no "dealers" having title to such patterns who are or can be deprived of the power to determine the resale price of such patterns; that said patterns are not sold outright to such agents; that said provision that respondent's patterns shall not be sold at less than "label prices" is contained only in contracts with agents for the sale of respondent's patterns; that there is no competition and can be no competition and no unfair competition in the sense contemplated by the Act of Congress approved September 26, 1914, entitled "An Act to create Federal Trade Commission to define its powers and duties and for other purposes," by reason of said provision; that the effect of an order of the Federal Trade Commission requiring the respondent to cease and desist from continuing the clause in its contracts with its agents, by which such agents are required to sell respondent's patterns at not less than "label prices" would not result in preventing unfair competition, but on the contrary would result in enabling one or more of its agents to unfairly compete with other of respondent's agents (who are the *alter ego* of respondent), and to unfairly compete with respondent in its sale of patterns in its

55 own retained business through its own salesrooms and branch offices and by mail; that respondent's contracts with agents for the sale of its patterns in substantially the same terms as hereinabove set forth have been in existence for about thirty years; that the act wrongfully charged against this respondent of refusing to sell its patterns to dealers who will not agree to conform to the retail price prescribed by the respondent, if actually committed by this respondent, would not and could not have the effect of constituting unfair competition, for the reason that if no patterns were sold there could be no competition in the sale thereof; and that respondent has not for a year last past nor at any time refused and does not refuse to sell patterns to dealers or any one else who will not agree to conform to the retail price prescribed by respondent, but imposes that condition only on its agents under contract as aforesaid for the sale of its patterns.

That this respondent has conducted its business in the manner aforesaid under such written contracts for a period of about thirty years and that such contracts were prepared and executed with its agents in good faith for the purpose of advancing and protecting this respondent in its business and not for the purpose of evading or circumventing any statute of the United States of America, or of any of the respective states thereof; and that the said contracts have been adjudicated and decreed to be "a lawful contract duly executed by both the parties thereof * * * capable of performance by both, and * * * no reason for non-performance by either" by the courts of last resort in many of the states of the Union, to wit: by the Court of Appeals of the State of New York,

56 than which no state court stands higher, in *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60; by the Supreme Court of the Commonwealth of Massachusetts, which has an equal standing with the Court of Appeals of New York, in *Butterick Publishing Co. v. Fisher*, 203 Mass., 122; by the Supreme Court of the State of Wisconsin in *Butterick Publishing Co. v. Rose*, 141 Wis., 553; by the Supreme Court of the State of Michigan in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich., 158, and by the Supreme Court of the State of South Dakota in *Sullivan v. Rime*, 35 S. Dak., 75, and in many other state courts in various states of the United States, and that a similar contract was held to be a contract of agency by the Supreme Court of the United States in *Wilcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S. 627.

That this respondent alleges that Congress never intended either the Sherman Anti-Trust Law nor the Clayton Act to interfere with established modes of business which had existed for so long periods and which were adopted in good faith to protect the business of respondent and not to restrain trade or create a monopoly and which do not injure and were not intended to injure any one.

Paragraph Seven. That respondent's business is conducted wholly independently of any of the other respondents named in the complaint herein and that none of the acts charged against it has been done in combination with, in conjunction with or under the direction or control of any of the other respondents named herein, or at the suggestion, behest or request of any of the other respondents named herein.

Paragraph Eight. That this respondent denies that for more than a year last past or at any other time, the respondents, the Butterick Company and the Federal Publishing Company, or either of them, transacted any business of the kind described in the said charge, or of any other kind, through this respondent, or through any of the other respondents named herein; and alleges that the Federal Trade

57 Commission, the complainant herein, is a subdivision of and an integral part of the Government of the United States of America; that in an equity suit brought in the District Court of the United States in and for the Southern District of New York by the said Butterick Company against the said United States of America, it was decided and adjudicated, among other things, that

the said Butterick Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court for the Southern District of New York on the 8th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon the said United States of America; that in another equity suit brought in the said District Court of the United States in and for the Southern District of New York by the said Federal Publishing Company against the United States of America, it was decided and adjudicated, among other things, that said Federal Publishing Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court of the Southern District of New York on the 7th day of July, 1917;

58 that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon said United States of America, and that by said judgments and each of them the matters herein in litigation were finally adjudicated and settled; that there has been no change in the manner in which this respondent has conducted its business in the respects litigated in said equity suits or either of them since the commencement of and decision of said suits in equity; and that the complainant herein is thereby estopped and debarred from prosecuting this proceeding upon the theory that the said respondents The Butterick Company and the Federal Publishing Company, or either of them, have been engaged or now are engaged in transacting business through this respondent, or any of the other respondents named in the complaint herein.

Paragraph Nine. That the Federal Trade Commission has no jurisdiction over the subject-matter of the said first charge.

II.

Paragraph One. This respondent denies each and every allegation with respect to it, contained in Paragraph One of the second charge contained in the complaint herein, in so far as said allegations purport to charge this respondent directly or indirectly with any matters and things contained in said paragraph, except that it admits that it is a corporation organized and existing under the Laws of the State of New York with its principal office and place of
59 business in the City of New York; and this respondent denies

that for more than a year last past the respondents, The Butterick Company and The Federal Publishing Company, through respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company have been engaged, and now are engaged in said city in the business of manufacturing paper dress patterns for all kinds of garments worn by women and children, in publishing periodicals and catalogues describing garments made from the patterns aforesaid, and in the sale and shipment of such patterns, periodicals and catalogues to persons and corporations in other states of the United States and in the District of Columbia, in direct competition with other persons and corporations similarly engaged.

Paragraph Two. This respondent admits that since the year 1900, all or practically all of the shares of capital stock issued by the respondents, The Butterick Publishing Company and The Standard Fashion Company, have been owned by the respondent, The Federal Publishing Company, and are now so owned; that since the year 1902 all or practically all of the shares of capital stock issued by the respondents, The New Idea Pattern Company and The Federal Publishing Company, have been owned by respondent, The Butterick Company and are now so owned, and that respondents, The Butterick Publishing Company, The Standard Fashion Company and The New Idea Pattern Company, are actively engaged in the business of manufacturing and selling patterns in commerce; and this respondent denies each and every other allegation
60 contained in Paragraph Two of the first alleged charge; and alleges that it is separately and competitively with the other respondents, Standard Fashion Company and Butterick Publishing Company and all other pattern companies actively engaged in the business of manufacturing and selling patterns in commerce.

Paragraph Three. That this respondent denies each and every allegation with respect to it, contained in Paragraph Three of said second charge, except that it admits the business of manufacturing and selling paper dress patterns for garments worn by women and children constitutes a portion of commerce among the States of the United States; that it has approximately 4,000 agencies for the sale of its patterns; that retail dry goods stores offer various advantages as such agencies; and that numerous persons and corporations are engaged in the manufacture of such patterns in competition with respondent.

Paragraph Four. This respondent denies each and every allegation with respect to it, contained in Paragraph Four of said second charge, in so far as said allegations purport to charge this respondent directly or indirectly with any of the matters and things contained in said paragraph, except that it admits that for more than a year last past, respondent in the course of its business has established agencies for the sale of its patterns under written instruments containing among other things, on the part of such agents, an agreement not to sell or permit to be sold on the premises of such agency, during the term of the agency, any make of patterns other than

those manufactured by this respondent as is more fully set
61 forth hereinafter; that this respondent has approximately
4,000 such agencies with whom it has contracts containing
said provision; that in several instances its agents have been induced
by competitors to violate the said negative covenant of this respondent's
contracts with its agents not to sell or permit to be sold on their
said premises any other make of patterns than those manufactured
by this respondent; that in several instances this respondent has
instituted suits to enforce performance of that provision of its
contracts; that in all such instances, except in the cases still pending and
undetermined, of which there are only two, the courts have uniformly
upheld the validity of said provisions in respondent's contracts and,
when requested so to do, have enforced said provisions of said
contracts by injunctions restraining such agents from selling or
permitting to be sold on their said premises during the term of their
contracts with respondent, any make of patterns other than those
manufactured by this respondent; that in some few instances, where
agents have refused to perform the conditions of their contracts
with this respondent, this respondent has terminated the said contract
and ceased to furnish such agents with patterns thereunder; and this
respondent denies each and every other allegation contained therein.

Further answering said second charge, this respondent respectfully
shows:

Paragraph Five. That this respondent is engaged in the manu-
facture and sale of dress patterns for garments worn by women and
children, and in the printing and publication of fashion
62 periodicals and catalogues; that the said paper dress patterns
so manufactured by this respondent consist of diagrams, de-
signs or construction models designed to enable persons to make
garments for themselves and others, which said diagrams, designs or
models are manufactured, for economic reasons, of tissue paper; that
said patterns are not "staple articles of trade" (as alleged in said
charge) or articles of merchandise, within the meaning of either
term; that said patterns are intangible rather than physical in their
nature; that their value depends, not upon the material out of
which they are manufactured, but upon the design or style, and the
continuance in style of the particular design; that said patterns are
issued and sold either through respondent's agencies hereinafter de-
scribed to the public, or directly to the public, only under the re-
spondent's trade-mark "New Idea Patterns;" that said patterns
never lose their identity as "New Idea Patterns," whether in the
hands of such agents for the sale of respondent's patterns, or of the
public; that this respondent has by a large expenditure of money
for advertising created a very valuable good will in its said trade-
name and trade mark; that this respondent for the protection of
its trade-mark "New Idea Patterns" guarantees to the customer, that
it will make good any loss sustained by its customer in case of any
error or imperfection in the pattern; that the salability of said
patterns depends upon the continuance in style of the particular
fashion of each particular pattern, and that said styles frequently
change by reason of changes of season, by reason of the character

of the material for which the particular design is suitable, and by reason of the desire of women generally for new styles; that
63 said patterns are perishable in their nature; that, in order to protect the respondent's said trade-mark and good will, the respondent replaces in the hands of its said agents old styles with new styles of patterns as fast as such styles change; that, in order to properly market its patterns, this respondent keeps in the hands of its agents as hereinafter more fully stated, sufficient stocks of patterns to meet the needs of the respective communities, and keeps said stocks up to date to meet the desire for the latest styles by constantly exchanging patterns which go out of style for new ones.

Paragraph Six. That this respondent markets its patterns principally through special agencies for the sale thereof established under contracts in writing, for a definite period of years under which this respondent supplies to the agent a minimum stock of patterns, for which the agent is required to advance in cash only half its value, as security for the performance of the contract, and agrees to supply such agent with such other patterns as he may require during the term of such agency, to exchange all patterns which go out of style for newer styles, and to take back the stock of patterns remaining in the agent's hands at the termination of the agency (which stock must not be less than the minimum amount so specified), and under which the agent agrees, among other things, to keep on hand for sale to the public at all times during the term of the agency (except during exchange periods), a stock of respondent's patterns to an amount not less than the minimum so specified, to keep the patterns on the ground floor of the agent's building, to give or cause
64 to be given by a lady attendant proper attention to the sale of respondent's patterns, to conserve the best interests of respondent at all times, not to remove the said pattern stock from its original location, nor to assign it or the agency without the written consent of this respondent, not to sell or permit to be sold on the agent's premises during the term of the agency, any other make of patterns, not to sell respondent's patterns except at label prices, and upon the expiration of the agency to return all patterns then held by such agent; that said patterns are advertised by and sold by said agents to the public as "New Idea Patterns" and not otherwise; that respondent guarantees to the purchaser from such agents the perfection of said patterns, and makes good to such purchaser any loss occurring through imperfection or error; that the intent and purpose of said contract is not to sell patterns to the agent, but to sell patterns to the public through such agent; that the effect of said contract is not to lease or sell said patterns to said agent; that this respondent retains a property interest in said patterns at all times while they are in the hands of the agent under such contracts; that said agents are clothed with a power only to convey a complete title to the purchaser thereof; that such agent must return all unsold patterns to this respondent; that the effect of such contract is not to substantially lessen competition or tend to create a monopoly; that this respondent does not place more than one agency in a town or community, except in cities where the population is sufficiently large

to make profitable the placing of more than one stock of patterns on the conditions hereinbefore mentioned; that in such instances no agency is placed so near another or existing agency as to interfere

65 with or draw from the trade of the latter; that the effect of the provision in respondent's contracts by which such agent covenants not to sell or permit to be sold any make of patterns other than those of the respondent, is to free and make available all the competitors of the respondent's agents to sell, or to act as agents for the sale of the patterns of respondent's competitors; that the effect of said provision, furthermore, it to prevent this respondent from establishing an agency for the sale of its patterns with any merchant who is handling the patterns of any of respondent's competitors; that except in very large department stores it would be unprofitable for any agent to undertake to handle two or more patterns, as the amount of space to be devoted to the sale of such patterns in his store, the amount of money deposited, the amount of help and the amount of advertising necessary to conduct such additional agency or agencies would be increased in proportion to the number of patterns handled; that if each merchant acted as agent for the sale of more than one pattern, the total sales of patterns by all agents in any given community would not exceed the total sales of all patterns if the respective agents each only handled one pattern; that the expenses of each such agent handling more than one pattern would be increased in proportion to the number of patterns handled; that the losses to the manufacturer through exchanges and returns would be increased correspondingly; that the said patterns are not furnished to the agent at any definitely fixed price, but the price which the agent pays for such patterns as are sold by him depends upon the quantity of patterns which are exchanged or returned, which can be definitely

66 determined only at the termination of the agency; that the more patterns each agent sells without exchange, the less said patterns cost said agent and this respondent, and that the more patterns which said agents exchange the greater the cost to the said agent of such patterns as are sold and the greater the cost to this respondent; that the purpose of the provision requiring such agents not to sell or permit to be sold on their premises any make of patterns other than those manufactured by this respondent, is to increase the number of respondent's patterns sold through such agents to the public, and to lessen the number of patterns to be returned to the respondent by such agents; that the sale of competing patterns in the same store by the same agent tends to prevent such agents from conserving the best interests of the agency for the sale of this respondent's patterns, and not alone to reduce the number of respondent's patterns sold by such agents, but to increase the number of patterns returned to this respondent; that during the term of such contracts patterns which go out of style are exchangeable by such agents for new and more saleable patterns, as already stated; that the effect of permitting an agent to sell competing patterns, would not alone be to reduce the number of sales to the public of respondent's patterns but to increase the number of patterns returned by such agents to the respondent for exchange during the term of

the contract; that the risk of sale of respondent's patterns under the terms of said contracts is substantially borne by this respondent; that the placing of two or more agencies for the sale of respondent's patterns in a town or a community where the demand is not sufficient to warrant the placing on sale of two or more sufficient

67 stocks of patterns would result in loss to this respondent, in that it would require respondent to exchange or take back substantially double the quantity of patterns which would be required for the conduct of one agency in such town or community; that the respondent does not place two such agencies in a community under such circumstances; that the said condition contained in the said contracts by which said agents agree not to sell or permit to be sold during the term of the agency any make of patterns other than those of respondent has been contained in respondent's contracts of agency for about thirty years; that the provision that such agents shall not sell or permit to be sold any make of patterns other than those of the respondent is inserted in said contracts in good faith solely for the protection of respondent's business and not for the purpose of restraining trade or for the purpose of engrossment of or securing a monopoly by this respondent of the pattern business or of any substantial part thereof; that said condition has not resulted in the engrossment or monopoly on the part of this respondent of the pattern business or of any substantial part thereof; that said condition affects only the agencies or avenues for distribution of respondent's patterns to the public and that although said condition has been contained in respondent's contracts for the said period of about thirty years, all of this respondent's competitors except the Butterick Publishing Company and Standard Fashion Company have come into being, developed and progressed while said condition was in effect, to the extent that said competitors now engross and control at least ninety-four per cent. of the pattern agencies or avenues for distribution of patterns in the United States; that the contracts above described are made only with agents
68 for the sale of respondent's patterns; and that respondent sells its patterns through its own salesrooms and branch offices and by mail to all others without agreement or restriction of any kind.

That this respondent has conducted its business in the manner aforesaid under such written contracts for a period of about thirty years and that such contracts were prepared and executed with its agents in good faith for the purpose of advancing and protecting this respondent in its business and not for the purpose of evading or circumventing any statute of the United States of America, or of any of the respective states thereof and that the said contracts have been adjudicated and decreed to be "a lawful contract duly executed by both the parties thereof * * * capable of performance by both, and * * * no reason for non-performance by either" by the courts of last resort in many of the states of the Union, to wit, by the Court of Appeals of the State of New York, than which no state court stands higher, in *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60; by the Supreme Court of the

Commonwealth of Massachusetts, which has an equal standing with the Court of Appeals of New York, in *Butterick Publishing Co. v. Fisher*, 203 Mass., 122; by the Supreme Court of the State of Wisconsin in *Butterick Publishing Co., v. Rose*, 141 Wis., 553; by the Supreme Court of the State of Michigan in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich., 158, and by the Supreme Court of the State of South Dakota in *Sullivan v. Rime*, 35 S. Dak., and in many other state courts in various states of the United States, and

69 that a similar contract was held to be a contract of agency by the Supreme Court of the United States in *Wilcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S., 627.

Paragraph Seven. That the business of this respondent is conducted wholly independently of any of the other respondents named in the complaint herein, and that none of the acts charged against it has been done in combination with, in conjunction with, or under the direction or control or at the suggestion, behest or request of any of the other respondents herein.

That this respondent alleges that Congress never intended either the Sherman Anti-Trust Law nor the Clayton Act to interfere with established modes of business which had existed for so long periods and which were adopted in good faith to protect the business of respondent and not to restrain trade or create a monopoly and which do not injure and were not intended to injure any one.

Paragraph Eight. That this respondent denies that for more than a year last past, or at any other time, the respondents, the Butterick Company and the Federal Publishing Company, or either of them, transacted any business of the kind described in the said charge, or of any other kind, through this respondent, or through any of the other respondents named therein; and alleges that the Federal Trade Commission, the complainant herein, is a subdivision of and an integral part of the government of the United States of America; that in an equity suit brought in the District Court of the United States in and for the Southern District of New York by the said Butterick Company against the said United States of America, it was decided and adjudicated, among other things, that the said the Butterick Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of said District Court for the Southern District of New York, on the 8th day of July, 1917; that the said United States of America appealed from

70 said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon the said United States of America; that in another equity suit brought in the said District Court of the United States in and for the Southern District of New York by the said Federal Publishing Company against the United States of America, it was decided and adjudicated, among other things, that said Federal Publishing Company was not and has not been transacting

business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court of the Southern District of New York on the 7th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon said United States of America, and that by said judgments and each of them the matters herein in litigation were finally adjudicated and settled; that there has been no change in the manner in which this respondent has conducted its business in the respects litigated in said equity suits or either of them since the commencement of and decision of said suits in equity; and that the complainant herein is thereby estopped and debarred from
71 prosecuting this proceeding upon the theory that the said respondents, The Butterick Company and the Federal Publishing Company, or either of them, have been engaged or now are engaged in transacting business through this respondent, or any of the other respondents named in the complaint herein.

Wherefore, this respondent respectfully asks that the said complaint against it be dismissed.

NOBLE, MORGAN & SCAMMELL,
JAMES B. SHEEHAN,
Attorneys for the Respondent
The New Idea Pattern Company.

115 Broadway, New York City.

CHARLES E. HUGHES,
Of Counsel.

72 STATE OF NEW YORK,
County of New York, ss:

Edgar L. Pearsall, being duly sworn, deposes and says that he is President of the respondent herein, The New Idea Pattern Company, and resides in New York City; that he has read and knows the contents of the foregoing answer and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

EDGAR L. PEARSALL.

Sworn to before me this 19th day of June, 1919.

A. P. SCHOEN,
Notary Public, No. 75, New York County.

73

EXHIBIT "C."

E. C. A.—F. L. T.

5-1-20.

UNITED STATES OF AMERICA, ss:

Before Federal Trade Commission.

At a Regular Session of the Federal Trade Commission, Held at Its Office, in the City of Washington, D. C., on the 12th Day of May, A. D. 1920.

Present:

Victor Murdock,
Chairman;
Huston Thompson,
William B. Colver,
Nelson B. Gaskill,
Jno. Garland Pollard,
Commissioners.

Docket No. 594.

FEDERAL TRADE COMMISSION

VS.

BUTTERICK COMPANY, FEDERAL PUBLISHING COMPANY, STANDARD Fashion Company, Butterick Publishing Company, New Idea Pattern Company, and Designer Publishing Company.

Complaint in the Matter of the Alleged Violation of Section 5 of an Act of Congress Approved September 26, 1914, and of Section 3 of an Act of Congress Approved October 15, 1914.

I.

The Federal Trade Commission having reason to believe from a preliminary investigation made by it, that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company, the Butterick Publishing Company, the New Idea Pattern Company, and Designer Publishing Company, hereinafter referred to as the respondents, have been and now are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and it appearing that a proceeding by it in respect thereof would be to the interest of the public, issues this complaint stating its charges in that respect upon information and belief as follows:

Paragraph One. That Butterick Company, Butterick Publishing Company, Standard Fashion Company, New Idea Pattern Company and Designer Publishing Company are corporations organized and existing under the laws of the State of New York; that Designer Publishing Company is a consolidation of and successor to Standard Fashion Company and New Idea Pattern Company; that Federal Publishing Company is a corporation organized and existing under the laws of the State of New Jersey and that each of said respondents has an office and its principal place of business in New York City, N. Y.

74 Paragraph Two. That Federal Publishing Company owns and controls all the issued and outstanding capital stock of Butterick Publishing Company and Standard Fashion Company; that Butterick Company owns and controls all the issued and outstanding capital stock of Federal Publishing Company and New Idea Pattern Company and likewise owns or controls all the issued and outstanding capital stock of Designer Publishing Company; that Butterick Publishing Company and Designer Publishing Company as the consolidation of and successor to Standard Fashion Company and New Idea Pattern Company, are each engaged in the manufacture and sale in interstate commerce, of paper dress patterns of women's and children's garments and in the publication and distribution in interstate commerce of periodicals and catalogues advertising and illustrating such patterns and that in the conduct of such business the last named respondents are operated, directed and controlled by Federal Publishing Company and Butterick Company.

Paragraph Three. That the manufacture and sale of paper patterns for women's and children's garments is practically dependent upon their distribution to the consumer through the medium of retail dry goods stores in which such patterns are carried as staple articles of trade; that each and all of the respondents are in competition with other producers of such patterns, but not with each other, for the dry goods stores which act as centers of distribution and for purchasers of such patterns from the stores.

Paragraph Four. That the sale of paper dress patterns is a valuable and important asset to a retail dry goods dealer as it tends towards the sale of the goods from which such patterns are made up and to increase the business of the store, particularly when the dress patterns are extensively advertised by this manufacturers.

Paragraph Five. That one of the practices of respondents is to fix a price for the resale of their patterns, in pursuance of which they have severally but in common action entered into written contracts with about twenty thousand retail dry goods dealers throughout the United States, each contract binding the dry goods retailer to maintain the resale price, which practice the respondents enforce by refusing to sell their patterns to dealers who refuse to enter into such contracts.

Paragraph Six. That another of the practices of respondents is to exclude the patterns of their competitors from the dry goods stores in which their own patterns are on sale, in pursuance of which they

have severally but in common action entered into written contracts with about twenty thousand retail dry goods dealers throughout the United States, each contract binding the dry goods retailer not to sell or permit the sale of any competitor's patterns on the premises, which practice the respondents enforce by threats to refuse and by refusals to sell its patterns to the dry goods retailers who refuse to enter into such contracts or be bound thereby, having entered into such contracts, and as well by threats of suits and institution of suits for damages.

75 Paragraph Seven. That the use by each and all of said respondents severally and in their common action of either and both of the above mentioned practices is an unfair method of competition in commerce within the meaning of Section 5 of an act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

II.

The Federal Trade Commission having reason to believe, from a preliminary investigation made by it, that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company, the Butterick Publishing Company, the New Idea Pattern Company, and Designer Publishing Company, hereinafter referred to as the respondents, have been and now are violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" issues this complaint, stating its charges in that respect on information and belief as follows:

Paragraph One. That the several recitals of paragraphs 1 to 6 inclusive are hereby charged as fully and completely as though the said several paragraphs were herein repeated verbatim.

Paragraph Two. That the actions and doings of the said respondents severally and in their common interest, hereinabove referred to and recited may be to substantially lessen competition and tend to create a monopoly in the line of commerce therein described, contrary to the intent and meaning of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

Therefore, notice is hereby given you, the said respondents, and each of you, that the charges of this complaint will be heard by the Federal Trade Commission at its office in the City of Washington, D. C., on the 6th day of July, A. D., 1920, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as the same may be reached; at which time and place you shall have the right to appear and show cause why an order should not be entered by the Federal Trade Commission requiring you to cease and desist from the violations of law charged in this complaint.

And you will further take notice that within thirty (30) days after the service of this complaint, you are required to file with the

Commission, an answer in conformity with Rule III of the Rules of Practice before the Commission.

76 In witness whereof, the Federal Trade Commission has caused this complaint to be issued, signed by its Secretary, and its official seal to be affixed hereto at the City of Washington, D. C., this 12th day of May, A. D., 1920.

[SEAL.]

J. P. YODER,
Secretary.

By the Commission.

CLAUDE R. PORTER,
Chief Counsel for the Commission.

77 EXHIBIT "D."

UNITED STATES OF AMERICA:

Before the Federal Trade Commission.

Docket No. 594.

FEDERAL TRADE COMMISSION

v.

BUTTERICK COMPANY, FEDERAL PUBLISHING COMPANY, STANDARD Fashion Company, Butterick Publishing Company, New Idea Pattern Company, and Designer Publishing Company.

Answer of the Designer Publishing Company, Inc.

I.

The Designer Publishing Company, Inc., designated herein as Designer Publishing Company by its attorneys, Noble, Morgan and Scammell, and James B. Sheehan, answering the complaint in the above entitled proceeding on its own behalf and on behalf of Standard Fashion Company and New Idea Pattern Company above named, consolidated with it and showing cause why an order to cease and desist should not be made herein, denies that the complainant herein has reason to believe from a preliminary investigation made by it, or otherwise, that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company,

78 The Butterick Publishing Company, the New Idea Pattern Company and the Designer Publishing Company, Inc., and/or any of them, jointly or individually, or in combination of any two or more of them, have been and/or now are using unfair methods of competition in interstate commerce in violation of the provision of Section 5 of the Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," or otherwise; denies that a proceeding by it in respect thereof would be to the interest of the public, and

Paragraph One. This respondent admits the allegations contained

in Paragraph One of the first count or charge of the complaint herein, except that it denies that the Standard Fashion Company and New Idea Pattern Company are, or that either of them is, doing business as a corporation organized and existing under the laws of the State of New York, or otherwise, and avers that said corporations were consolidated before the institution of this proceeding as The Designer Publishing Company, Inc., and ceased thereafter to carry on any business whatever.

Paragraph Two. This respondent denies each and every allegation contained in Paragraph Two of the first count or charge of the said complaint, except the allegations that The Butterick Company owns all the issued and outstanding capital stock of the Federal Publishing Company, that this respondent is engaged in the manufacture and sale in interstate commerce of paper dress patterns of women's and children's garments, and in the publication and distribution in interstate commerce of periodicals and catalogues, and that the Butterick Publishing Company is similarly engaged.

79 Paragraph Three. This respondent denies each and every allegation contained in Paragraph Three of the first count or charge of the complaint herein. This respondent, however, admits that it is engaged in competition with other producers of such patterns in securing proprietors of dry goods stores to act as agents for the sale of its patterns, and that the Butterick Publishing Company is similarly engaged.

Paragraph Four. This respondent admits the allegations contained in Paragraph Four of the first count or charge in the said complaint but alleges that said allegations are true only to the extent and only for the reasons stated in Paragraph Nineteen of this answer.

Paragraph Five. This respondent denies each and every allegation contained in Paragraph Five of the first count or charge in said complaint. This respondent, however, admits that its contracts with agents for the sale of its patterns contain a provision that respondent's patterns shall not be sold except at label prices, but denies that such label prices are resale prices, as charged or attempted to be charged in the complaint herein.

Paragraph Six. This respondent denies each and every allegation contained in Paragraph Six of the first count or charge of said complaint. This respondent, however, admits that its contracts of agency for the sale of its patterns made with retail dry goods dealers (as well as similar contracts made with others than retail dry goods dealers to act as such agents) contain a provision whereby such agents agree not to sell or permit to be sold during the term of such agency on the premises in which such agency is agreed to be conducted, any make of patterns other than those of this respondent, but denies that the making and/or the performance of such
80 contracts constituted or constitute the "practices" alleged or attempted to be alleged in said Paragraph Six of said complaint.

Paragraph Seven. This respondent denies each and every allegation contained in Paragraph Seven of the first count or charge in said complaint.

Further answering the said first count or charge:

Paragraph Eight. This respondent alleges that it is engaged in the manufacture and sale of dress patterns for garments worn by women and children, and in the printing and publication of fashion periodicals and catalogues; that The Standard Fashion Company and The New Idea Pattern Company, by the consolidation of which this respondent was formed, were engaged in the same line of business for about thirty-three years; that the said business in so far as it involves the manufacture and sale of its patterns is unique, complex and different from any other line of business; that the said dress patterns so manufactured by this respondent consist of diagrams, designs or construction models, designed to enable persons to make garments for themselves and others, which said diagrams, designs or models are manufactured, for economic reasons, of tissue paper; that said patterns are the concrete expression in tissue paper of the designs of garments; that the purchasing public purchasers and pays for the design, the information, service and instruction furnished by respondent, and not for the mere physical product exemplified in the respective pieces of paper of which the pattern is composed; that unaccompanied by such service, information and instructions, the physical products would be of little or no value; that

81 their value lies in their incorporeal attributes and not their physical attributes; that said patterns are not "staple articles of trade" (as alleged in said charge) or articles of merchandise within the meaning of either term; that said patterns are intangible rather than physical in their nature; and that their value depends, not upon the material out of which they are manufactured, but upon the design or style, and the continuance in style of the particular design.

That the foundation of respondent's business is service to the purchasing public, primarily directly to the public and secondarily indirectly to the public through its agents as part of its service to the public; that respondent's patterns enable purchasers thereof to dispense with the services of tailors and dressmakers, and to secure garments in materials, in which such garments are not offered for sale ready made; that respondent's patterns are manufactured in a number of sizes, sometimes as many as ten, other times less, the average number of sizes issued being seven; that in respondent's periodicals it publishes illustrations of garments for which it issues patterns, and publishes a variety of useful information with respect to such garments, furnishing in detail descriptions of the persons for whom such garments would be suitable and the sizes in which respondent makes patterns, the kinds of materials suitable for such garments, instructions for cutting the material and making the garments, and other information upon the subject of making the garments; that respondent's patterns consist not alone of the parts or diagrams of such patterns, but also of a variety of other information useful to a person desiring to make the garments; that respondent's patterns

82 are folded and enclosed in envelopes; that on the envelopes are printed statements of the quantities of material that will be required to make the garments to which the patterns cor-

respond in the particular size for which the pattern is issued, and in the various widths in which appropriate materials are sold by manufacturers and dealers; that where the garment may be made without all of the parts shown in the illustrations or contained in the pattern, a separate statement of the amount of material required when such parts are omitted and of the quantities required for such parts are also given; that the envelopes contain a statement of the number of pieces of which the pattern is composed and a pictorial illustration in diagram-atic form of each of the several parts of the pattern; that each of the parts of the pattern itself is perforated with an identifying number, and the diagrammatic illustrations contain the name of each part of the pattern together with the identifying number which appears on the respective part of the pattern, so that the user of the pattern may ascertain that all its parts are therein contained, and may identify each part thereof; that the envelopes contain also instructions for laying out the respective parts of the pattern on the material, for cutting the material in accordance with the pattern, and for lengthening and shortening such parts of the garments as may require lengthening or shortening in order to give a more perfect fit; that the cost to the respondent in producing these patterns lies principally in the cost of its designing, fitting and production developments, and in securing and furnishing the service above described; that the mere manufacturing cost of the production

83 of the pattern itself is but a small fraction of the total cost of the production of the pattern and the service furnished; that the purchasing public purchases primarily the service and information which accompanies the pattern and without which the pattern would be of little or no value.

That the incidental service to the public through the agents for the sale of respondent's patterns consists of placing in the store of the agents as large an assortment of patterns in as large a variety and number of sizes as the custom of the particular community will support, the media for creating a demand for the patterns, and instructing saleswomen in agents' stores how to render such service most effectively; that this service is best given to the public where a complete assortment of the various styles and a complete assortment of sizes is offered to the public; that owing to the necessity of exchanging patterns as they go out of style for new patterns, and taking back at the end of the agency of all the patterns which remain on hand, there is a limit, fixed by economic commercial possibilities, to the completeness of the assortment of styles and sizes of such styles that can be offered to the public, and to the number of agencies or places of distribution through which the patterns can be so offered; that there are in the United States over 135,000 cities, towns and villages, but it is commercially possible to carry a complete assortment of styles and sizes in only nineteen agencies of the respondent in the United States; that in the numerous other agencies of the respondent (of which there are nearly eight thousand in the United States) the assortment of styles is incomplete, and the assortment of sizes is incomplete, the quantity of sizes varying

84 proportionately with the population of the particular town or city; that there are in the United States approximately one hundred cities in which this respondent has or in which it is commercially possible or profitable to place two or more agencies for respondent's patterns and there are approximately eight thousand cities or towns in the United States in which this respondent has not more than one agency for the sale of its patterns; that the sale of respondent's patterns depends upon the service it thus furnishes the purchasing public, either directly or through agencies for the sale of its patterns; that such service is given the public better by one agency with a complete assortment of styles and sizes, than by two or more agencies with less complete assortments of styles and sizes; that one hundred per cent service is only given where a complete assortment of styles and sizes can be furnished, which, as stated, has been found to be commercially possible in only nineteen of respondent's 8,000 agencies, even with the provisions in the contracts as to price and not selling other makes of patterns; that any assortment less than complete, furnishes less than one hundred per cent of such service; that as more fully stated hereinafter, respondent's methods of transacting its business are directed primarily to increasing its service, and the order which complainant seeks to have made in this proceeding would operate to impair such service, and to injure the public.

That said patterns are issued and sold either through the agencies herein described to the public, or directly to the public, or to retailers other than such agents under the respondent's trademarks "Standard Patterns," "New Idea Patterns" and "Standard-New Idea Designer Patterns"; that said patterns never lose their identity as such, whether in the hands of such agents, dealers or the public; that this respondent has by a large expenditure of money for advertising created a very valuable good will in its said trade-
85 name and trade-mark, particularly for the sale of up-to-date and prevailing styles; that this respondent for the protection of its good will and trade-mark guarantees its patterns to its customers, that it will make good any loss sustained by its customers in case of any error or imperfection in its patterns; that this respondent does make good any such loss; that the salability of said patterns depends upon the continuance in style of the particular fashion of each particular pattern and its accuracy and dependability; that said styles frequently change by reason of changes of season, by reason of the character of the material for which the particular design is suitable, and by reason of the desire of women generally for new styles; that said patterns are perishable or ephemeral in their nature; that when the design ceases to represent a prevailing style, the value of the pattern is destroyed, as the chief use of a pattern is as a model to produce a prevailing style; that, in order to protect the respondent's trade-mark and good will, the respondent replaces in the hands of its said agents old styles with new styles of patterns as fast as such styles change; that to prevent out of date patterns remaining on the market and injur-

ing respondent's good will, respondent compels the return of all patterns unsold on the termination of the agency, and that in order to properly market its patterns, this respondent keeps in the hands of its agents, as hereinafter more fully stated, sufficient stocks of patterns to meet the needs of the respective communities and keeps said stocks up to date to meet the desire for the latest styles by constantly exchanging patterns which go out of style for new ones.

86 That the sale of patterns is not made in the same manner as the sale of articles of merchandise is ordinarily made; that the purchaser does not select the pattern desired from an examination or inspection of the patterns, themselves, as merchandise ordinarily is purchased; that patterns are kept in envelopes in cabinets, and are not open to the inspection of customers; that in practice, the purchaser of a pattern seldom or never sees the pattern until after it shall have been purchased; that from an inspection of a pattern, a customer could not form the slightest opinion whether it is what is desired; that a pattern cannot be selected like staples by ordering the best pattern, or the finest grade, or by ordering in any of the other ways in which articles of merchandise are generally ordered; that a pattern is ordered to enable a person to make some particular garment; that the garment which such customer desires to make is not exhibited to such customer by the agent; that the selection of a pattern is invariably made from illustrations of garments prepared by the respondent and published by the respondent in periodicals, fashion sheets or catalogues; that the pattern itself is not illustrated in such periodicals or catalogues as is charged by the complainant in Paragraph two of the first count or charge in the complaint herein; that in the selection of a pattern the customer relies entirely upon the reputation of the manufacturer for furnishing a pattern by which the garment illustrated can be reproduced so as to fit the person for whom it is intended; the pattern is not tried on as would be the garment if that were to be purchased; it is not tested for quality, material, perfection in making, or for any other attribute; the agent does not figure in its sale

87 otherwise than in being the medium of the delivery; and the pattern is purchased solely on faith in the manufacturer.

That the sale of respondent's patterns to the public is induced principally through the gratuitous distribution of "Standard New Idea Designer Styles," an advertising medium published by this respondent, monthly, which illustrates garments of prevailing style, for the making of which this respondent manufactures and sells patterns and by catalogues, similar advertising media; that said Standard New Idea Designer styles and catalogues are distributed gratuitously to the public by respondent's agents and not sold to the public, as alleged in said complaint; and that the selling prices of the patterns are stated in said publications.

Paragraph Nine. This respondent alleges that it markets its patterns through its branch offices, salesrooms, the mail and special agencies for the sale of its patterns, established under contracts in writing, a sample copy of which is hereto annexed, marked "Exhibit

A," and made part hereof; that while some of the conditions of said contract are expressed in the terms of sale, such conditions are limited and restricted, and when construed together with such limitations and restrictions and in the light of the practices of the parties thereunder, and with the other terms and conditions of the contract, such conditions are wholly inconsistent with the legal conception of a sale; that a contract containing like expressions in the terms of sale was construed as a contract of agency by the Supreme Court of the United States in *Willcox v. Ewing*, 141 U. S., 627; and that a contract in all essential respects identical with that of the respondent was held to be a contract of agency in *Weiboldt v. Standard Fashion Co.*, 80 Ill. App., 627.

88 That an examination of all the terms of said contract in connection with the manner in which the respondent conducts its business as hereinafter more particularly set forth will show (1) that the transaction to which such contract relates is not a sale but that it is an agreement of this respondent and the merchant, with whom a particular contract is made, to enter into a joint adventure for the distribution of the patterns of this respondent to the public, in which both this respondent and the merchant are interested and in which this respondent retains an interest in and control over the patterns to protect its trade, good will and ensure the handling of its patterns in the manner best calculated to maintain their reputation and the merchant is given the privilege of exchanging patterns as they go out of style for new styles and is required at the termination of the agreement to return the unsold patterns and is entitled to receive for the patterns returned seventy-five per cent of the price at which they were originally billed to him; and (2) that until a pattern is delivered to one of the public complete title does not pass, and that, on account of the exchange privilege and the return requirement, neither the price to be paid by the merchant nor the cost to this respondent of the pattern handled under the particular contract can be determined until the termination of the contract, which last feature alone clearly differentiates the transaction from a sale.

That under said contracts this respondent supplies to the agent a minimum stock of patterns, for which the agent is required to advance in cash only half its net value as security for the performance of the contract, and for the return on the termination of the contract of the unsold stock of patterns and the respondent agrees to supply such agent with such other patterns as he may require during the term of such agency, to exchange all patterns which go out
89 of style for new styles, and to take back the entire stock of patterns remaining in the agent's hands at the termination of the agency (which stock, as hereinafter stated, must not be less than the minimum amount so specified), and under which the agent agrees, among other things, to keep on hand for sale to the public at all times during the term of the agency a stock of respondent's patterns to an amount not less than the minimum stock so specified, to keep the respondent's patterns on the ground floor of the agent's store, in a space mutually agreed upon, to give or cause to be given

by a lady attendant proper attention to respondent's patterns, to conserve the best interests of respondent at all times, not to remove the said pattern stock from its original location, nor to assign it or the agency without the written consent of this respondent, not to sell or permit to be sold on the agent's premises where the exclusive agency is being conducted during the term of the agency any other make of patterns, not to sell respondent's patterns except at label prices, that is not to ask a customer other than respondent's published prices, and upon the expiration of the agency to return all patterns then held by such agent; that the return of all patterns not disposed of to retail purchasers is an obligation imposed upon such agent, and not a mere privilege or option conferred upon him; that the intent, purpose and effect of said contract are not to sell patterns to the agent, but to sell patterns to the public through such agent; and that said agents (less certain specified discounts) pay this respondent only for such patterns as are sold by such agent to the public; that this respondent retains a property interest in said patterns at all times while they are in the hands of the agents under

90 such contracts; that said agents acquire only sufficient interest in the patterns to enable them to give title to purchasers; that the agents are clothed with power only to convey a complete title to said patterns to the purchasers thereof; that even after the patterns pass into the hands of the public, the responsibility of the respondent does not cease; that the respondent still retains an interest in the patterns with respect to its guarantees; that the guarantee of perfection and the warranty that the pattern will produce the garment shown in the illustrations from which the patterns are selected is made by the respondent directly to the public, and is not a guarantee by the agents; that the respondent makes good any damage resulting from imperfection to the purchasing public and not to the agent; that if an agent makes good this guarantee before referring the same to the respondent, any payment so made is made by such agent on behalf of this respondent, and the guarantee is fulfilled and the money paid by this respondent.

Paragraph Ten. This respondent alleges that the effect of this respondent's contracts is not to require such agents to compete unfairly with respondent's competitors, or with agents for the sale of the patterns of this respondent's competitors, or with dealers therein, or with other agents of this respondent, and is not to substantially lessen competition or to tend to create a monopoly; that this respondent does not place more than one agency in a town or community, except in cities where the population is sufficiently large and with several trading centres to make profitable and convenient to the public the placing of more than one agency; that in such instances no agency is placed so near another or existing agency as to interfere with or draw from the trade of the latter; that it is com-
91 mercially unprofitable to place two agencies in communities of less than 50,000 trading population; that respondent's experience has proven that in such towns two different agents will not handle the same make of patterns; that to a considerable extent sales

of such patterns are made to the users thereof either directly through its own salesrooms, branch offices or through the mails; that the respondent under the terms of said contracts at all times during the term of any such agency, retains a property interest in and retains control over the patterns furnished to such agent- until the said patterns are delivered through such agents to the public; that this respondent under the terms of said contracts exercises a supervision over the stocks of patterns while in the hands of such agents, and when such stocks are found to be less than the minimum stock so specified or when such stocks are found not to be suitably assorted as to new styles this respondent reassorts said stocks and fills them in to the amount of such minimum and as to the new styles; that this respondent under the terms of said contracts has at all times during the period of such agency, not only a property interest in the patterns themselves, but an interest in the price at which said patterns shall be sold; that the restriction in said contracts prevents agents from selling above label prices as well as below, and has operated to prevent "profiteering" in patterns by the agent; that the sale of respondent's patterns at less than the label price would tend to injure and destroy the value of respondent's trade-mark and good will, and to cheapen the value of its patterns in the estimation of the public; that the sale at more than label prices would be against the interest of the public; that cutting of the prices of the same

92 would tend also to demoralize the respondent's business, to discredit respondent with its customers to whom in selling its patterns through the medium of its publications it announces the price, which shall be neither more nor less at any of its distributing agencies and injuriously affect the organization created for the distribution of respondent's patterns; that if respondent were to permit merchants in any given community to cut the prices of its patterns such price cutting would result in reducing the number of agencies for the sale of respondent's patterns in or about such community to those only engaged in that practice, and to deprive respondent of the services of other agents who desire to engage in a fair and legitimate conduct of their business and to faithfully perform the conditions of their agency agreements; that respondent could not procure agents for the sale of its patterns in small towns or in towns surrounding cities or places in which such merchants cut the price of its patterns; that the compensation of such agents is fixed at a proportion of the retail price of the patterns named in said contracts and that, unless the respondent could insure to the agent the fixed proportion of the retail price of patterns provided in such contracts for patterns sold through the agent to the public, respondent could not make its contracts with agents for terms of years, and its business would be completely demoralized; that the profit to the agent on the sale of patterns after deducting the expense of conducting the agency, is so small that the agent by cutting prices would incur a loss without a corresponding advantage; that the agent's business in patterns could not be increased by cutting prices, as he gets all, or practically all, the trade in the town or territory by

93 reason of the fact that there is no other agent for the sale of respondent's patterns in the same town or territory; that the effect of respondent's practice in requiring its agent or distributors to sell at the price which respondent announces to its customer when she selects a pattern from respondent's catalogues is not to eliminate competition in price among "dealers"; that there are no "dealers" in respondent's patterns in the sense in which said word "dealers" is used in the charge herein; that there are no "dealers" having title to such patterns who are or can be deprived of the power to determine the resale price of such patterns; that such patterns are not sold to such agents; that said provision that respondent's patterns shall not be sold except at "label prices" does not fix the resale price of the patterns (as alleged by complainant), for since the patterns are not sold to the agent, the sale by such agent of patterns to the public is not a resale; that said provision is contained only in contracts with agents for the sale of respondent's patterns; that there is no competition and can be no competition and no unfair competition in the sense contemplated by the Act of Congress approved September 26, 1914, by reason of said provision; that the effect of an order of the Federal Trade Commission requiring the respondent to cease and desist from continuing the clause in its contracts with its agents, by which such agents are required to sell respondent's patterns at "label prices" would not be to prevent unfair competition, but on the contrary would result in enabling one or more of its agents to unfairly compete with other of respondent's agents (who are the *alter ego* of respondent), and to unfairly compete with respondent in its sale of patterns in its own retained business through its own salesrooms and branch offices and by mail; that if the

94 respondent actually as charged against it refused to sell its patterns to dealers who will not agree to conform to the retail price prescribed by the respondent, such act would not and could not have the effect of constituting unfair competition, for the reason that if no patterns were sold there could be no competition in the sale thereof; that it always has been and still is the custom in the pattern trade for the manufacturer to announce the price and for the agent to sell at that price, and that custom, which is an integral part of every pattern agency contract, has always been and is still followed by every pattern competitor of this respondent, whether by express provisions of contract or otherwise; and that the purchasing public has not been injured by said custom.

This respondent alleges, upon information and belief, that no complaint has been made to the complainant herein, by either the public or a competitor, that this respondent has or that any of the other respondents have been guilty of the practices alleged in Paragraph Two of the first count or charge in said complaint; that the complainant has no information or knowledge of any such practice, and that complainant herein has made that charge solely by reason of its construction of the legal effect of the respondent's agency contracts.

This respondent further alleges that in every town in which it has but one agency for the sale of its patterns, there are other stores in

which agencies are or may be established for the sale of competitors' patterns, and that in every town in which it has more than one agency for the sale of its patterns, such agencies are established in different trading centers, and in every such trading center there are other stores in which agencies for the sale of competitors' patterns are or may be established; and that where any competitor

95 has no agency in any such town or trading center that condition is not due to the operation of respondent's contracts.

Paragraph Eleven. This respondent alleges that the effect of the provision in respondent's contracts by which the agent agrees not to sell or permit to be sold on the premises wherein such exclusive agency for the sale of respondent's patterns is being conducted during the term of such agency, any other make of patterns is to make all the competitors of the respondent's agents in the city, town or territory in which respondent's agency is being conducted, free and available to sell, or to act as agents for the sale of the patterns of respondent's competitors; that the effect of said provision, furthermore, is to prevent this respondent from establishing an agency for the sale of its patterns with any merchant who is handling the patterns of any of respondent's competitors; that except in very large department stores it is and would be unprofitable for any agent to undertake to handle two or more patterns, as the amount of space to be devoted to the sale of such patterns in his store, the amount of money deposited, the amount of help and the amount of advertising necessary to conduct such additional agency or agencies would be increased disproportionately to the number of patterns handled; that if each merchant acted as agent for the sale of more than one pattern, the total sales of patterns by all agents in any given community would not exceed the total sales of all patterns if the respective agents each handled only one pattern; that the expenses of each such agent handling more than one pattern would be increased in proportion to the number of patterns handled; that the losses to

96 the manufacturer through exchanges and returns would be increased correspondingly; that such losses would necessarily result in increased prices to the public; that the said patterns are not furnished to the agent at any definitely fixed price but the price which the agents pays for such patterns as are sold by him depends upon the quantity of patterns which are exchanged or returned, which can be definitely determined only at the termination of the agency; that the more patterns each agent sells without exchange, the less said patterns cost said agent and this respondent, and that the more patterns which said agents exchange the greater the cost to the said agent of such patterns as are sold and the greater the cost to this respondent; that the purpose and effect of the provision requiring such agents not to sell or permit to be sold on their premises any other make of patterns are to increase the number of respondent's patterns sold through such agents to the public, and to lessen the number of patterns to be returned to the respondent by such agents; that such effect enables the respondent to sell its patterns through agencies at lower prices than it otherwise could afford to do; that the sale of competing patterns in the same store by the same

agent tends to prevent such agents from conserving the best interests of the agency for the sale of this respondent's patterns, and not alone to reduce the number of respondent's patterns sold by such agents, but to increase the number of patterns returned to this respondent; that during the term of such contracts patterns which go out of style are exchangeable by such agents for new and more salable patterns, as already stated; that the risk of sale of respondent's patterns under

97 the terms of said contracts is substantially borne by this respondent; that the placing of two or more agencies for the sale of respondent's patterns in a town or a community where the demand is not sufficient to warrant the placing on sale of two or more sufficient stocks of patterns would result in loss to this respondent, in that it would require respondent to exchange or take back substantially double the quantity of patterns which would be required for the conduct of one agency in such town or community; that the respondent does not place two such agencies in a community under such circumstances; that the said condition contained in the said contracts by which said agents agree not to sell or permit to be sold on the premises during the term of the agency any other make of patterns has been contained in the contracts of agency of this respondent and the Standard Fashion Company and the New Idea Pattern Company consolidated with it for thirty-three years; that said provision is inserted in said contracts in good faith solely for the protection of respondent's business and not for the purpose of restraining trade or for the purpose of engrossment of or securing a monopoly by this respondent of the pattern business or of any substantial part thereof; that said condition has not resulted in the engrossment or monopoly on the part of this respondent of the pattern business or of any substantial part thereof; that said condition affects only the agencies or avenues for distribution of respondent's patterns to the public, and that although said condition has been contained in respondent's contracts for the said period all of this respondent's competitors have come into being developed and progressed while said condition was in effect, to the extent that said com-

98 petitors now engross and control at least eighty per cent of the pattern agencies or avenues for distribution of patterns in the United States; that said condition has not resulted in enabling this respondent to secure a majority of the large dealers to act as agents for the sale of its patterns, and that in the fifty largest cities in the United States a majority of the largest dry goods dealers sells the patterns of respondent's competitors (other than the Butterick Publishing Co.) to the exclusion of respondent; that the contracts above described are made only with agents for the sale of respondent's patterns; and that respondent sells its patterns through its own salesrooms and branch offices and by mail to all others than its said agents without agreement or restriction of any kind.

Paragraph Twelve. This respondent alleges that the said contracts have been adjudicated and decreed to be "a lawful contract duly executed by both the parties thereof * * * capable of performance by both and * * * containing no reason for non-performance by either" by the courts of last resort in many of the States of the

Union, to wit: by the Court of Appeals of the State of New York, than which no State court stands higher, in *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60; by the Supreme Court of the Commonwealth of Massachusetts, which has an equal standing with the Court of Appeals of New York, in *Butterick Publishing Co. v. Fisher*, 203 Mass., 122; by the Supreme Court of the State of Wisconsin, in *Butterick Publishing Co. v. Rose*, 141 Wis., 553; by the Supreme Court of the State of Michigan in *Peerless Pattern Co. v. Gauntlett Dry Goods Co.*, 171 Mich., 158, and by the Supreme Court of the State of South Dakota in *Sullivan v. Rime*, 35 S. Dak., 75.

99 and in many other State courts in various States of the United States.

This respondent alleges that Congress never intended either the Sherman Anti-Trust Law nor the Clayton Act, nor any other anti-trust law, to interfere with established modes of business which had existed for so long a period and which were adopted in good faith to protect the business of respondent and not to restrain trade or create a monopoly and which do not injure the public and were not intended to injure the public or any one else.

Paragraph Thirteen. This respondent alleges that the interests of the public are not adversely affected by the operation of respondent's contracts; that the interest of the public is best served by the two practices which the complainant herein seek- to condemn, namely, the sale of respondent's patterns at uniform prices, and the sale of respondent's patterns exclusively by its agents; that the sale of respondent's patterns at uniform prices enables respondent to maintain agencies for the sale of its patterns in smaller communities and enables the purchasing public to secure such patterns in their own community upon the same terms and conditions that such patterns could be secured in any other place; that without such practice and the assurance to agents that their margin of reimbursement or compensation shall be maintained, agencies could not be maintained in the smaller communities, and the public would be deprived of the service now secured; that by reason of the consolidation of the Standard Fashion Company with the New Idea Pattern Company, the respondent now has two agencies in more places than is commercially profitable, and that such condition is in the

100 course of adjustment; that there are not more than 55 cities in which two agencies can be profitably maintained; that only in approximately 4,200 cities in the United States the respondent has agencies carrying stocks of patterns; that the balance of respondent's agencies consist merely of places in which orders are taken for respondent's patterns for the accommodation of the public; that the interests of the public depend upon service; that the nature of the service given by the respondent is stated in Paragraph Eight hereof; that respondent's competitors distributing their patterns through agencies have approximately 42,000 agencies for the sale of their patterns distributed almost wholly among the same towns in which respondent's agencies are located; that only a small proportion (as to the exact percentage of which respondent is not advised)

of respondent's competitors' agencies are located in towns in which respondent has more than one agency and that the vast bulk of the business of respondent's competitors is conducted in the same towns in which the respondent's agencies are located; that as respondent is informed and believes there are approximately no more than a few hundred agencies for the sale of patterns, out of an approximate total of 50,000 of such agencies, in which two or more makes of patterns are handled; that in all of the other places in which such agencies are conducted by respondent's competitors one agent acts exclusively for one manufacturer, and the effect thereof is that each agent for each respective manufacturer makes more effort to advance the trade of such manufacturer, than he would if he handled two or more makes of patterns; that by the practice of single exclusive agencies, each manufacturer has on sale in each of the towns in

101 which he is represented, a more complete assortment of such manufacturer's patterns in the number of styles and in the number of sizes, than if such agent carried two or more makes of patterns, or if said manufacturer had two or more agents in such towns; that as respondent is informed and believes there is no place in the United States in which two or more makes of patterns are profitably handled by the same agent; that as the business is now conducted each manufacturer offers to the public through the medium of an exclusive agency as large an assortment of patterns both in styles and in sizes as the demand in the particular community for such manufacturer's patterns will warrant, and that through such practice the entire trade in each particular community in the patterns of any manufacturer is thus secured to such manufacturer; that the public in such community is thus offered as complete an assortment of both styles and sizes as can be profitably offered to it; that service to the public is best attained by effective competition; that the most effective competition is attained by a single agency in a community with as complete an assortment of styles and sizes as the demand of that community will warrant; that an agent acting exclusively for one manufacturer engages more effectively in competition with other manufacturers, than if he handled two or more makes of patterns; that where one agent undertakes to handle two or more makes of patterns, there is not competition between the respective patterns; that in such circumstances the agent is precluded from conserving the interest of one manufacturer at the expense of another, and is precluded from making any special effort to advance the sale of either pattern; that in such circumstances the result in the past has been that such agent fails and neglects to perform any of the activities which are ordinarily performed by the agent for the sale of one pattern exclusively;

102 that respondent is enabled to furnish the public with such service primarily through placing agencies for the sale of its patterns in all communities large enough to support such agencies by requiring its agent to sell the respondent's patterns exclusively and to sell them uniformly at the retail prices announced to the public by respondent, neither more -or less; that the public interest demands that the price at which the pattern is offered be as low as

is consistent with reasonable profit and the merit of the goods; that said demand is best satisfied by exclusive agencies; that in those places in which less than a complete assortment of sizes is offered, a certain proportion of the public, whose physical measurements are larger or smaller than the average, cannot be accommodated out of the stock of patterns offered, or that can be profitably offered, but must wait until the agent orders the extreme size from the manufacturer; that the proportion of the public thus discommoded increases in inverse proportion to the number of sizes carried by the agent in stock, the fewer sizes the greater the number of the public discommoded; that the number of the sizes carried in stock by an agent is determined by the probable sales out of the total number for sale, or the proportion of the number sold to the number returned; that to realize a profit at least 60% of the patterns placed in the hands of the agent must be sold to the public; that the greatest proportion of sales is made from the medium sizes; that where a pattern is cut in seven sizes, and the agent carries only two sizes, customers whose measurements conform to the other five sizes cannot be supplied from the stock; that if it were profitable or advantageous to the agent or manufacturer to secure the trade of those thus not served, it would be more to the interest of the public that

the agent carry a larger assortment of one make, for instance,
 103 to carry four sizes of one make of patterns rather than two sizes each of two different makes, or six sizes of one make rather than two sizes each of three different makes, and in like manner as to any increasing number of makes; that respondent has only one agent in any place where such conditions exist, and that in any such place, all the other merchants are free to handle the patterns of a competitor; that if any competitor's patterns are not handled in such a place, it is for reasons other than the operation of respondent's contract; that the effect of one agent undertaking in such circumstances to handle two patterns of different makes, would be to increase the cost of patterns to the public, as the handling of two patterns would double the expenses of the merchant acting as agent for two manufacturers, and the cost to each manufacturer would be increased by the increased number of patterns exchanged and returned; that such a procedure would result in increased cost to the consumer without any corresponding increase in convenience; that the catalogues of this respondent each season display illustrations of about one thousand garments for the making of each of which this respondent issues a pattern; that each pattern is issued by this respondent in an average of about seven sizes; that the experience of respondent and its predecessors shows generally that in cities of a trading population of about 25,000, the average selection would have about four sizes of each design; in cities of about 10,000 three sizes of each design; in places of about 5,000 or less two sizes of each design, and in places of a trading population of less than 1,500, it is not profitable to place a stock of patterns at all; that in towns of

1,500 or less an assortment of one pattern of each size would
 104 be equal to one pattern for each man, woman and child in the community; two sizes would be equal to two patterns for

each; that were an agent to handle two sizes of two different makes he would have to keep on hand four patterns for each person; and that were he to carry two sizes of all eight principal patterns marketed through agencies he would have sixteen patterns for each person; that there are, according to the 1910 United States Census, only about 120 cities having a population of 50,000 or over; 131 of less than 50,000 and over 25,500; 445 of less than 25,000 and over 10,000; 844 of less than 10,000 and over 5,000; 1,043 of less than 5,000 and over 2,000, and 2,921 of less than 2,000 and over 1,000.

That respondent does not place agencies in towns in which there is but one store or but a few stores, or where the effect of the exclusive sale provision would be to exclude competitors from establishing agencies therein; that in all places in which respondent's agencies are established, there is ample opportunity for the establishment of agencies by competitors; and that the only effect which said exclusive sale provision has is to preclude unfair competitors from grafting upon respondent's good will and diverting same to their own use.

That it has always been and still is the custom of all manufacturers who market their patterns through agencies to require the exclusive sale by such agents of their particular patterns, and that said custom is now followed by all of this respondent's competitors who sell their patterns through agencies, in over 99 per cent. of their agencies; that said custom tends to the best advantage of each of said competitors; that where one agent handles one line of patterns exclusively
105 he gives better attention to the sale of one particular pattern, and makes greater effort to induce customers to come to his store for that particular make of pattern, than he would were he handling two or more makes; that the effect of such custom is to stimulate competition and to increase sales of competing patterns as well as those of this respondent; that in order to induce agents to handle more than one pattern, it is necessary to make special terms and concessions; that merchants undertaking to handle two or more makes of patterns exact special terms and conditions; that the handling of two or more makes of patterns is uneconomical; that any business practice which is uneconomical is contrary to the best interests of the public; that the number of agents or dealers handling two or more patterns at one time is a minor fraction of one per cent. of the whole number of agents or dealers handling patterns, exclusive of mail order houses and publishers of periodicals and newspapers; that in few instances, if any, and in no instance known to this respondent, is any such agent handling the patterns of two or more competitors upon the same terms as are granted by said competitors to agents who handle the patterns of one of such competitors exclusively; that in most instances such dealers as permit two or more patterns to be sold in their stores, do so by renting space in their respective stores to the pattern manufacturers at rentals far in excess of any profit that could be legitimately made from the amount of sales made in their stores, or are induced to do so by the competing manufacturer guaranteeing the agent a cash consideration

grossly in excess of any profit that could be realized from the sale of patterns.

106 That the effect of one agent or dealer handling two or more makes of patterns in one town (except in very large cities where two or more agencies for the same make of patterns can be profitably maintained) would be either to cause other merchants to refuse to handle any of the patterns handled by the agent first mentioned, or to cause such other merchants to take an agency for the same patterns, or one of them; that in the event other merchants refused to handle the same pattern, which is the usual custom, the purchasing public would lose the benefit of the service secured through an exclusive agency, the agent and the manufacturer would suffer the losses and waste already described, and competing merchants would lose the advantage or asset described in Paragraph Four of the first count or charge of the complaint; that in the event that competing merchants should handle one or more of the patterns handled by the first mentioned agent, each merchant would suffer the losses and waste already described, each manufacturer's loss and waste would be correspondingly increased, and such losses would be reflected either in increased prices to the public, or insolvency to the manufacturers, and in either event the public would be the sufferer.

That the essence of a successful agency is service to the public and that the effect of obviating such increase of waste and expense by reducing the number of sizes carried, the amount of effort made or expense incurred to sell the patterns, or the space devoted to their sale would be to decrease in proportion to such reduction the service now extended to the public; and that the effect of an order by the complainant herein to respondent to cease and desist from continuing its exclusive agencies or from establishing additional
107 agencies would be to the detriment of the public whose interest the complainant was created to conserve.

That the effect of handling of two or more competing patterns by one agent, would be to force other merchants who desire to secure the benefit of the good will of pattern manufacturers, and the sale of piece goods consequent upon inducing intending pattern customers to patronize their stores, to place two or more patterns of different makes on sale, and to force pattern manufacturers to place agencies with all merchants at a corresponding increase of cost to the agents and to the manufacturer, all of which must be paid by the public; and that the effect upon the public would be increased cost and increased selling prices of patterns.

Paragraph Fourteen. This respondent alleges that it has not sold or is not now selling its patterns in interstate commerce or otherwise, upon the condition or with the proviso, agreement or understanding, express or implied, that such patterns shall not be resold except at prices fixed by this respondent, or that the purchasers thereof shall not sell or permit the sale of the patterns of any of respondent's competitors and that in the sale of its patterns, either in interstate commerce or otherwise, it affixes no condition, proviso or understanding either of the kind charged in the complaint herein, or of any other kind.

Paragraph Fifteen. This respondent alleges that it has not sold and is not now selling its periodicals in interstate commerce or otherwise upon the condition or with the proviso, agreement or understanding, express or implied, that they shall not be sold except at prices fixed by this respondent, or that the purchaser thereof shall not deal in the periodicals of a competitor, and does not exclude or attempt to exclude the sale of competitors' periodicals, either in the stores in which agencies for the sale of this respondent's patterns are being conducted, or elsewhere, and that it sells its periodicals without any condition, proviso or understanding either of the kind charged in the complaint herein, or otherwise; and that the periodicals of competitors are being sold and have been sold by agents of this respondent without complaint or objection on the part of this respondent.

Paragraph Sixteen. This respondent alleges that it has never refused and does not now refuse to sell its patterns or its periodicals to dealers or any other persons who refuse to enter into contracts with it of the character alleged in Paragraph Five or Six of the first count or charge of said complaint; and that the only persons whom it requires to sell its patterns at the retail price (which are not resale prices, as alleged by complainant) or from whom it requires an agreement not to sell or permit to be sold upon the premises any other make of pattern, are the agents of this respondent and the premises are those in which the exclusive agency is conducted, and that such requirements are made only under written contract, as aforesaid.

Paragraph Seventeen. This respondent alleges that the effect of said contracts between this respondent and its agents is not to make a sale, or to create the relation of vendor and vendee; that respondent does not convey title to the patterns and undertake to retain the incidents of title; that the effect of the provision therein that the agent shall not sell or permit to be sold on the premises in which an agency for the sale of respondent's patterns is being conducted during the term of such agency any other make of patterns is not a prohibition against a purchaser dealing in the goods, wares or merchandise of a competitor, but is only a reasonable and proper restriction imposed upon an agent to secure a reasonable and proper performance of his duties as such; and that neither is within the inhibition of any statute which the complainant herein is empowered to enforce.

That, in substance, the provision therein requiring the agent not to sell or permit to be sold on the premises during the term of the agency any other make of patterns, is in the nature of a lease of a specific portion of the agent's premises for the conduct of an exclusive agency for the sale of respondent's patterns, upon the condition that no part of said premises shall be used for the sale of competitors' patterns; that the effect of said provision is not to prohibit the agent from selling other patterns, but is only to restrict the use of the premises of which part is demised to respondent, with respect to the sale of patterns.

That the intent, purpose and effect of respondent's contract is not to sell the patterns to the agent appears from the facts that the

agency is furnished with a minimum assortment of patterns to offer to the public, is bound to replenish the stock as it is depleted by sales to the public, is obligated to have on hand at the termination of the contract an assortment at least equal to the amount of the original assortment, and is obligated to return at least that amount at the end of the contract to the respondent; and also from the facts that the agent (less discounts) pays only for such patterns as are sold to the public; that his duties are not and cannot
110 be fulfilled by the payment of money as in the case of a sale; and that if the clauses requiring the agent not to sell except at label prices and to sell only respondent's patterns were eliminated the transaction would not be a sale, but one which imposes fiduciary obligations upon the agent upon behalf of this respondent.

That the only interest in or dominion over the patterns which such agent acquires is to place the patterns in his store in a given space, to sell them to the public at retail, and if not sold to the public at retail, to return them to the respondent; that the agent (except stipulated discounts) pays only for such patterns as are sold; that such conditions and all the other conditions of the contract are inconsistent with the principles or attributes of a sale; and that the effect of said contracts is to create a special or limited agency or joint adventure over which the complainant herein is without jurisdiction.

Paragraph Eighteen. This respondent alleges that there are engaged in the manufacture and sale of paper patterns for garments for women and children and in publishing fashion periodicals and selling such patterns through them, in competition with this respondent, over thirty prominent persons, firms and corporations, and that of said competitors only two (including the Butterick Publishing Company) market their patterns exclusively through agencies and periodicals published by them, in substantially the same manner as this respondent, and only seven (including the Butterick Publishing Company), market through agencies at all; that of said seven, one has chosen to establish not more than one agency on an average in each state; that of the remaining six all except
111 the said Butterick Publishing Company, market their patterns also through periodicals published by others than themselves (the circulation of which is many times greater than the circulation of respondent's periodicals) through newspapers, and through large mail order houses, such as Sears Roebuck Co., Montgomery Ward & Co., and Charles Williams Stores; that the sale of patterns through said last mentioned sources, and through other sources by respondent's other competitors, constitutes a very large proportion of the entire pattern business of the United States; and that by reason thereof, the effect of respondent's contracts, which compete only for agencies, cannot possibly be, and "may" not be, even within any forced or fanciful interpretation of the said Act of Congress of October 15, 1914, to substantially lessen competition or to tend to create a monopoly; and that the charge made by the complainant in Paragraph Two of the first count or charge of said complaint in

that respect is based, as respondent is informed and believes, solely upon an unreasonable, forced and fanciful interpretation of said Section 3 of said Act of October 15, 1914, without relation to any existing facts, and upon complainant's conclusion of law that any violation of said Section constitutes also a violation of Section 5 of the Act of Congress approved September 26, 1914.

Paragraph Nineteen. This respondent alleges that, by the expenditure of large amounts of money by it and its predecessors over a period of thirty-three years, and by the manufacture of patterns known to produce the results intended to be produced, and so guaranteed by this respondent, it has built up and acquired a very valuable good will and patronage in the pattern business among a
112 large number of customers who ordinarily patronize many different dry goods stores, but who, to purchase respondent's patterns, find it convenient and expedient to purchase same in the store of respondent's local agent; that in the establishment of agencies for the sale of respondent's patterns, this respondent turns over that good will in the vicinity of the agent's store to such agent to conserve, protect and foster, and it is to preserve and protect respondent's said good will, that respondent requires its agents to conserve respondent's interests at all times during the term of such agency, and not to permit same to be shared or diverted by competitors to their own use and profit; that, as alleged in Paragraph Four of said first count or charge in said complaint, the sale of paper patterns is an important asset to a retail dry goods dealer, as it tends toward the sale of other goods, but the value thereof to the dealer depends principally upon the sale of piece goods to make up the garments for which the patterns are designed, and lies wholly in the fact that the customers for patterns do not ordinarily patronize the store of such agent, that the demand for the sale of such patterns is created by the pattern manufacturer (as stated in Paragraph Eight hereof) and not by the agent, and that such demand (*i. e.*, the good will of the manufacturer) is a substantive part of the value of such an agency, entrusted to the agent; that, by enabling the agent to supply such demand, this respondent furnishes to and affords such agent an opportunity of offering goods to purchasers of patterns adapted to such goods who would not otherwise be brought into his store; and that the effect of any order of the complainant herein to permit competitors of this respondent to sell or cause such competitors' patterns to be sold alongside of this respondent's
113 patterns, or in the same store, would be to tend to divert this respondent's good will or cause same to be diverted to such competitors, a practice which the courts, as more fully appears in Paragraph Twelve hereof, have uniformly condemned and held to constitute unfair competition on the part of such competitor, and against public interest, which unfair competition the complainant herein was created by Congress to suppress rather than to encourage.

Paragraph Twenty. Upon information and belief, this respondent alleges that the complaint herein was instigated by and is being prosecuted in the interest of one or more competitors of the respondent, and not in the interest of the public; that such competitor and/or

competitors, for the purpose of preying upon and diverting the good will of the respondent to itself or themselves, have for sometime past been endeavoring to induce agents of respondent and its predecessors to violate their contracts with this respondent by representing to such agents that the complainant herein has declared respondent's contracts invalid, and by offering to indemnify, and where such breaches of contract have been induced by entering into contracts to indemnify such agents against loss or damage by reason of such breaches of contracts; by offering to pay, and where successful, by paying or giving valuable consideration to such agents as inducements to such breaches of respondent's contracts, and by false representations and by various and devious other methods of unfair competition; that said competitors make special terms to respondent's agents if they will carry their patterns alongside of this respondent's patterns, so that said competitors are relieved of part of the extra

114 cost and waste thereby incurred, by limiting exchanges and the amount of patterns that may be returned, as more fully hereinafter set forth; that the terms and conditions of respondent to agents for agencies for the sale of respondent's patterns are more favorable than the terms of any of its competitors, except those of The Butterick Publishing Company, which are substantially the same as those of this respondent; that other competitors pretend to exchange patterns at 100% of the price at which they were originally billed; but that such competitors limit either the number of patterns which may be so exchanged, or limit the kinds of patterns which may be received in exchanged for same, or limit the times during which and conditions under which such exchanges can be made, require agents to order and pay for specific assortments of new patterns each month and to reorder all patterns sold, so that the pretended exchange at 100% of the price at which the patterns were originally billed becomes in fact an exchange of patterns at a large discount; that such competitors also pretend to allow patterns to be returned at the termination of the agency at 100% of the amount at which said patterns were originally billed, but in fact limit the number of patterns to be returned to the amount of a so-called "standing credit" (usually one-half or less than one-half the amount of the stock of patterns in the hands of the agent), resulting either in making the discount at which the patterns are to be returned at the termination of the agency 50% of the amount at which such patterns were originally billed, or in leaving in the hands of the agent unsalable patterns to an amount equal in most cases to one-half of the amount of stock originally carried, and in many cases to an amount largely in excess thereof; and to that extent the transaction

115 with their agents constitutes a sale of the patterns to the agent of such competitors, and not a sale to the public through such agents; that such competitors for some years past have been endeavoring to induce breaches of respondent's contracts with its agents, and in some cases have succeeded in so doing, for the purpose of diverting respondent's said good will to themselves, and to "stick" (in the language of said competitors) respondent's agents

with stocks of competitors' patterns; that in such instances, where respondent's contracts have been so breached, respondent and its predecessors have not alone threatened suit but have brought suit, and in every instance but one, which is still pending, have recovered judgment; that the effect of an order by the complainant herein to respondent to cease and desist from exercising the right granted it by statute and common law to enforce its contracts by suit, would be to encourage unfair competition through corrupt inducement of breaches of respondent's contracts, instead of preventing such unfair acts of competition in pursuance of the duties imposed by Congress upon the complainant herein; and that assuming the acts complained of were committed by this respondent, and that they constitute acts of unfair competition as charged by complainant, they constitute acts of unfair competition between private corporations, involve nothing unfair to the public generally, and within the decision of the Supreme of the United States, filed June 7, 1920, in *Federal Trade Commission v. Anderson Gratz et al.*, affirming the decree of the United States Circuit Court of Appeals, Second Circuit, are acts which were not contemplated by the Act of Congress of September 26, 1914, and not within the jurisdiction of the complainant herein.

Paragraph Twenty-one. On information and belief, this
116 respondent alleges that one of respondent's competitors who made complaint against respondent to the complainant herein is the Vogue Company; that said Vogue Company, while pretending that the acts of the respondent constitute methods of unfair competition toward the said Vogue Company, at the same time for the purpose of inducing agents of the respondent to violate their contracts with the respondent by placing on sale Vogue patterns alongside of respondent's patterns, represented to respondent's agents that the Vogue Company, by reason of the higher retail prices of its patterns, and by reason of an alleged appeal to customers different from that of this respondent, is not engaged in competition with the respondent; that in one instance the said Vogue Company endeavored to induce an agent for the sale of respondent's predecessor's patterns, to wit, D. H. Holmes Company of New Orleans, Louisiana, to violate the provisions of their contract with the respondent's predecessor and place Vogue patterns on sale in its store in New Orleans, La., during the term of their contract with the respondent's predecessor; that the object of said Vogue Company in soliciting said breach of contract was not to obtain an avenue for the disposition of its patterns in New Orleans, La., but was to secure to itself a portion of the good will of this respondent's predecessor, which had been entrusted to said D. H. Holmes Company; that said D. H. Holmes Company has continued to act as agent for the sale of said Vogue patterns, and that the sole complaint in that respect of said Vogue Company is not that the contracts of respondent and its predecessors operate to prevent their procuring agencies for the sale of their goods, but that they have failed to secure the benefit of
117 the good will of the respondent's predecessor, which upon respondent's learning of said attempt was transferred elsewhere in New Orleans, La.; that there were numerous other places

in New Orleans, La., where the said Vogue Company could obtain representation if it so desired; that the said Vogue Company, although its pattern business has been in operation for several years, has established only approximately forty-four agencies; that instead of guaranteeing the accuracy of its patterns, the said Vogue Company warns its customers against cutting the goods for the making up of garments by their patterns without having first tested the accuracy of the fitting qualities of the patterns by cutting out the linings and adjusting them to the form; that the prices of said Vogue Company's patterns at retail are from three to four times as high as the prices of respondent's patterns; that it publishes no advertising media to create a demand for its patterns; that the terms to agents are very much less advantageous than the terms of this respondent to its agents; and that the real reason the said Vogue Company has not been able to establish a large number of agencies for the sale of its patterns, just as all other competitors of the respondent have been able to do, is that the said Vogue Company has no good will to transfer to intending agents, its patterns are practically unknown, and are in effect represented by the Vogue Company itself to be unreliable, and its terms to agents are unattractive.

Paragraph Twenty-two. This respondent alleges on information and belief that shortly after the creation of the Federal Trade Commission, the respondent, The Butterick Publishing Company, 118 made a complaint to the complainant herein of unfair methods of competition on the part of its competitor, the Pictorial Review Company; that among the matters complained of were that said Pictorial Review Company procured breaches of said respondent's contracts with agents by furnishing agreements to indemnify said agents and to hold them harmless against actions instituted by said respondent, by means of false statements made by said Pictorial Review Company and its agents with respect to the petitioner's business and business methods, by entering into conspiracies with agents and former agents of said respondent by which the latter were to simulate large sales of Pictorial Review patterns, to be used as advertising for the purpose of injuring this respondent, by procuring unfairly business for the said Pictorial Review Company by practically giving away its Pictorial Review patterns to large dry goods dealers for the purpose of injuring said respondent by advertising such large merchants as agents for the Pictorial Review patterns and by making false statements with respect to the financial standing and credit of said respondent; that the complainant herein refused to take any action upon said complaint, because of its then formed opinion that the alleged "tying clauses" in said respondent's agency contracts made said contracts invalid; that although, as said respondent was informed by said commission, it had found its complaints against the Pictorial Review Company with respect to all of the other matters therein complained of to have been well founded, the complainant refused to enter a complaint against the Pictorial Review Company for or on account of any of said actions; that at the time said complaint was made as well as at the present

time, it was and is an unfair method of competition, according to all of the adjudicated decisions of the courts of the United States, including the Supreme Court of the United States and the Court of Appeals of the State of New York (in which State both said respondent and the Pictorial Review Company are resident) to secure business by inducing a breach of contract, whether the contract was valid or not.

Paragraph Twenty-three. Upon information and belief, this respondent alleges that instead of proceeding against the Pictorial Review Company, the complainant herein sought to compel manufacturers engaged in the sale of paper patterns for garments to modify their contracts by striking therefrom the provision contained in such contracts generally by which the agent for the sale of any particular pattern agreed not to sell or permit to be sold on his premises during the term of the agency any other make of patterns; that in pretended compliance with such demand on the part of the complainant herein, the Pictorial Review Company withdrew from the contract then being made by it, the provision by which such agents were required to sell Pictorial Review patterns at retail prices and were required not to sell during the term of the contract on the agent's premises any other make of patterns; and also withdrew from the agents the right to return the unsold pattern stock to the Pictorial Company at the termination of the agency; that the Pictorial Review Company thereupon substituted a unilateral and unenforceable promise to allow the return of said stock of patterns upon the condition that during the term of the contract the agent shall not have sold Pictorial Review patterns at less than retail prices, and shall not have sold any other make of patterns; that the

other competitors of this respondent, except the Butterick Publishing Company, issued new forms of agreement from which they omitted the provisions requiring the agent to sell patterns at retail prices, and requiring the agent not to sell or permit to be sold on its premises during the term of the agency any other make of patterns and in consideration of allowing to the agents the privilege to sell other makes of patterns they took from the agent part of the privilege of exchanging all patterns during the term of the agency and the privilege of returning any of the unsold stock of patterns, except sufficient to pay the so-called "standing credit"; and that said competitors, while pretending to make such changes in their contracts, secured renewals and extensions of their former agreements containing the provisions which they pretended to strike out of their contracts, with the result that the vast bulk of competitors' contracts, as well as the contracts of the respondent, contain the provisions condemned in the complaint herein.

Paragraph Twenty-four. This respondent alleges that as a result of the refusal of the complainant herein to compel said Pictorial Review Company to desist from its unfair methods of competition, and as a result of the assumption by the complainant of judicial authority to determine the legal effect of pattern contracts, the competitors of respondent have since been engaged in a campaign of unfair competition, misrepresentation and attempts to secure

breaches of respondent's contracts by its agents and in some cases securing breaches of respondent's contracts, and have secured a large number of breaches of pattern contracts.

Paragraph Twenty-five. This respondent alleges that on
121 the 24th day of March, 1919, the complainant herein issued a complaint against all of the respondents named herein, except this respondent, which was not then in existence, in which it charged substantially against said respondents the acts charged in Paragraph Five of the first count or charge of the complaint herein, as constituting unfair methods of competition within the meaning of Section 5 of the Act of Congress of September 26, 1914, and in which as a second count it charged against said respondents substantially that the acts specified in Paragraph Sixth of said first count or charge as constituting a violation of section 3 of the Act of Congress of October 15, 1914; that said respondents each denied each of said acts; that complainant herein issued a somewhat similar complaint against the Pictorial Review Company, one of the competitors of respondents; that thereafter by an order made without notice to said respondents the complainant herein consolidated the proceeding against the Pictorial Review Company with that against said respondents; that upon motion of said respondents the order thus made was vacated; that upon motion made by said respondents, the various proceedings against each were severed; that upon the complainant's own motion, the complaint in said proceeding against the respondents the Butterick Company and the Federal Publishing Company was dismissed; that upon the complainant's own motion the complaints against the Butterick Publishing Company, the Standard Fashion Company and the New Idea Pattern Company with respect to the acts charged as constituting a violation of Section 3 of the Act of Congress of October 15, 1914, was dismissed; that thereafter the said proceeding was brought on for trial upon the remaining issue that the acts such as are described in Paragraph

Five of the first count herein constituted a violation of Sec-
122 tion 5 of the Act of Congress of September 26, 1914, and the complainant herein thereupon without prior notice to the said respondents in said proceeding endeavored to substitute a new and different cause of action in the guise of an amendment; that said respondents refused to proceed upon the trial of the new issue of which they had no prior notice, unless an opportunity was afforded them to answer the new issue, which opportunity was denied and moved that the complainant herein be required to state the remaining issues under the original complaint, and exclude any issues not specified therein; that thereupon the complainant herein undertook to reinstate the original complaint against the five respondents named and to restore the two charges first mentioned; that said respondents objected; and the complainant dismissed the whole proceeding that in all said proceedings counsel for the complainant herein stated in open court that they had no evidence whatever to support the charge contained in the first count in said proceeding which is substantially the same as the charges now contained in Paragraph Five of the first count or charge of the com-

plaint in this proceeding; that said counsel for the complainant also admitted that they had no evidence to support the charges against the respondents, the Butterick Company and the Federal Publishing Company, that the complainant herein had no jurisdiction over them or either of them because they were not engaged in interstate commerce and that the decision of the United States Court in that respect referred to in Paragraph Thirty-two hereof was *res adjudicata* as against and binding upon the complainant herein.

123 Paragraph Twenty-six. This respondent alleges that in the proceeding to which the preceding paragraph relates, the complainant herein demanded the same relief or order as demanded herein, and based its complaint substantially on the same facts as are alleged in the complaint herein except that the facts alleged in Paragraph Five hereof were therein charged to constitute a violation of Section 5 of the Act of Congress of September 26, 1914, and the facts alleged in Paragraph Six hereof were therein charged to constitute a violation of the Act of Congress of October 15, 1914, while in the present complaint both series of allegations are charged to constitute violations of both said acts; that in said proceeding said respondents denied all the material facts alleged in said complaint and said respondents furnished the complainant with copies of their agency contracts and with statements under oath by their respective officers substantially to the effect of the allegations hereinbefore contained; and that the complainant has failed to allege herein the terms and conditions of respondent's contracts or the facts and conditions of the trade as applicable to the operation of said contracts, which, if alleged, would negative the legal conclusions contained in the present complaint as to the effect of said contracts.

Paragraph Twenty-seven. This respondent alleges that the complainant herein, instead of going to trial upon any of the issues created by it, dismissed such issues, reinstated them and changed its theory, at least four times, and again dismissed them, each time giving publicity through the public press to the fact that the complainant herein charged said respondents with the acts alleged in such complaints to the great financial injury of this respondent, and with the effect of discrediting their business methods by giving such publicity to such charges of the complainant; that 124 complainant at all said times had full knowledge that, under the decisions of the courts, what constitutes unfair methods of competition under Section 5 of the Act of Congress of September 26, 1914, or what constitutes a violation of Section 3 of the Act of Congress of October 15, 1914, was held to be matters of law to be ultimately determined by the courts and not by the complainant herein; that by such publicity the complainant encouraged travelers of the competitors of this respondent to go to respondent's agents and by a distorted statement of the facts printed in the press to solicit business from respondent's agents on the ground that its contracts are invalid and unenforceable; that its conduct in its business relationship with the agents is unfair, inequitable and unjust, thus causing unrest among the respondent's agents and causing breaches of contract and breaches of faith and causing unfriendly feeling to arise between

the agent and respondent instead of the cordial one that now exists; and that the effect of such procedure on the part of the complainant was to accomplish, at least partially by indirection, what complainant had failed to accomplish through said proceeding.

Paragraph Twenty-eight. This respondent alleges that the practices of this respondent, which, with full knowledge of the facts, the complainant states incorrectly in Paragraphs Five and Six of the first count or charge of the complaint herein, do not constitute an unfair method of competition within the meaning of said Act of 125 Congress of September 26, 1914; that said acts have never heretofore been regarded as opposed to good morals; that said acts involve no bad faith, fraud or oppression, and that said acts involve no dangerous tendency unduly to hinder competition or create a monopoly; and that the said Act of Congress was not intended by Congress to fetter free and fair competition as commonly understood and practiced in the trade and uniformly adjudged and decreed to constitute fair and free competition under the decisions cited in Paragraph Twelve hereof.

Paragraph Twenty-nine. This respondent alleges that the only issue raised by the complaint herein upon the facts as they exist and have existed for decades prior to the creation of the complainant, the Federal Trade Commission, is an issue of law as to whether the contract between this respondent and its agents constitutes a contract of sale, an agency or a joint adventure, and that the complainant, being purely an administrative body, is without jurisdiction to determine that issue; and that the effect of the failure of the complainant herein to set forth a copy of respondent's contract in the complaint herein or to state the terms and conditions thereof, and the effect of complainant's attempt to state as facts its conclusions as to the legal effect of respondent's contracts, are to create false issues and to prevent it appearing that the complainant was proposing to exercise the functions of a court.

Paragraph Thirty. This respondent denies the jurisdiction of the complainant herein to inquire into or make an order herein, requiring this respondent to cease and desist from making or enforcing its contracts of agency for the sale of its patterns or closing the courts to this respondent upon each of the following grounds:

126 (a) That the contract is one of joint adventure either of agency or of sale.

(b) If the contract is one of joint adventure that the complainant herein has no jurisdiction thereof as the transaction does not constitute a sale.

(c) If the contract is one of agency, that this Commission has no jurisdiction thereof because the contract is not one of sale.

(d) That if the contract is one of sale, as claimed by the complainant, the provision therein fixing the price at which the patterns are to be sold at retail is not one which involves interstate commerce, because if the transaction is one in which the patterns are delivered to the agent in the same state in which the agent's place of business is located, the provision contained in the contract for the sale of patterns only at label prices, is one which constitutes intrastate com-

merce solely, and is not within the jurisdiction of the complainant.

(e) That if the contract is one in which the delivery is made in a state other than the one in which the patterns are sold, that interstate commerce ceases when the patterns reach the agent, and the provision fixing the price at which the patterns are to be sold, constitutes purely intrastate business over which the Commission has no jurisdiction.

(f) That the interest in or the title to the patterns, if any, acquired by the agent under the said contract is limited in quality and duration; that the agent does not, and never can, acquire a complete title to any pattern which is the subject matter of the agency;

127 that the interest the agent does acquire therein is qualified and limited by the term of the contract, at the end of which if the pattern is unsold he must return it to this respondent, and his interest thereupon ceases, and that under the terms of the contract the interest obtained by the agent therein is simply an interest sufficient to enable him to convey a complete title thereto to the purchaser.

(g) That the effect of an order of the complainant to this respondent to cease and desist from performing and requiring the performance on the part of its agents of the terms of its contracts would be to impair the obligation of the contract between this respondent and each of its 8,000 agents for the sale of its patterns, not one of whom is made a party to this proceeding; and that the Congress of the United States has not vested in the complainant herein power or jurisdiction so to do.

(h) That respondent maintains its agencies under uniform terms to all agents whether in the larger cities or smaller communities; that respondent's competitors offer different terms to different merchants; that the merchants have learned that respondent and the Butterick Publishing Company are the only pattern manufacturers who give all merchants uniform terms, and that the effect of an order of this complainant requiring the respondent to permit its agents to handle patterns of competitors would require a departure on the part of this respondent from its uniform terms to agents and require respondent to fix one rate to agents who handle respondent's patterns exclusively, and another to those who also handle competing patterns.

Paragraph Thirty-one. The respondent alleges that its business is conducted wholly independently of any of the other respondents named in the complaint herein, and none of the acts charged
128 against it has been done in combination with, in conjunction with or under the direction or control of any of the other respondents named herein, or at the suggestion, behest or request of any of the other respondents named herein.

Paragraph Thirty-two. This respondent denies that the respondents, the Butterick Company and the Federal Publishing Company, or either of them, have transacted or are now transacting any business of the kind described in the said charge, or of any other kind, through this respondent, or through any of the other respondents named herein; and alleges that the Federal Trade Commission, the

complainant herein, is a subdivision of and an integral part of the Government of the United States of America; that in an equity suit brought in the District Court of the United States in and for the Southern District of New York by the said Butterick Company against the said United States of America, before the consolidation of the Standard Fashion Company and the New Idea Pattern Company as The Designer Publishing Company, Inc., it was decided and adjudicated, among other things, that the said Butterick Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court for the Southern District of New York on the 8th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said

129 United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon the said United States of America and its various departments; that in another equity suit brought in the said District Court of the United States in and for the Southern District of New York by the said Federal Publishing Company against the United States of America, before said consolidation, it was decided and adjudicated, among other things, that said Federal Publishing Company was not and had not been transacting business through this respondent, or through any of the other respondents named in the complaint herein, as appears by the judgment filed in said equity suit in the office of the Clerk of the said District Court of the Southern District of New York on the 7th day of July, 1917; that the said United States of America appealed from said judgment to the Supreme Court of the United States, and subsequently, as the said appeal was about to be argued in said Supreme Court, the said United States of America withdrew said appeal, making the judgment of the said District Court final and conclusive upon said United States of America, and its various departments, and that by said judgments and each of them the matters therein in litigation were finally adjudicated and settled; that there has been no change in the manner in which the said respondents Butterick Company or Federal Publishing Company or this respondent has conducted its business in the respects litigated in said equity suits or either of them since the commencement of and decision of said suits in equity; and that the complainant herein is thereby estopped and debarred from prosecuting this proceeding upon the theory that the said respondents The Butterick Company and the Federal Publishing Company, 130 or either of them, have been engaged or now are engaged in transacting business through this respondent, or any of the other respondents named in the complaint herein.

Paragraph Thirty-three. This respondent alleges that the complainant herein has no jurisdiction of any kind over the Butterick Company or the Federal Publishing Company or their respective

activities, as neither is engaged in interstate commerce; and has no jurisdiction over the New Idea Pattern Company or the Standard Fashion Company, as neither is now existent or was existent for the purpose of this proceeding at the time it was instituted; that the Butterick Publishing Company is not operated or controlled by this respondent; that said companies and each of them were made parties to this proceeding with full knowledge of the facts in those respects, and that the purpose and effect thereof is to give to the activities of this respondent a semblance of illegality and an atmosphere of monopolistic tendency which do not exist; and this respondent objects to said companies or any of them remaining parties to this proceeding against it, and demands that the complaint herein be severed as to this respondent.

Paragraph Thirty-four. For further answer in the nature of a plea in abatement to the first count or charge in the complaint herein, this respondent alleges that the joinder of the six respondents in one proceeding is improper for the reason that the issues are not the same as to each, that the same evidence is not admissible as to each and the same principles of law are not applicable as to each, for which reason a severance is requested.

131 Paragraph Thirty-five. For further answer in the nature of a demurrer to the first count or charge in the complaint herein, this respondent avers that the said count or charge does not state facts sufficient to constitute a charge of unfair competition within the meaning of the Act of Congress approved September 26, 1914.

II.

And answering the second count or charge in said complaint, and showing cause why an order to cease and desist should not be made herein, this respondent denies that the complainant herein has reason to believe from a preliminary investigation made by it or otherwise that the Butterick Company, the Federal Publishing Company, the Standard Fashion Company, The Butterick Publishing Company, the New Idea Pattern Company, and The Designer Publishing Company, Inc., called herein, Designer Publishing Company, or any of them, jointly or individually, or in combination of any two or more of them, have been and/or now are violating the provisions of Section 3 of an Act of Congress approved October 15, 1914, entitled, "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," or otherwise; desire that a proceeding by it in respect thereof would be in the interest of the public, and

Paragraph One. This respondent repeats, reiterates and makes part hereof each and every denial and each and every admission and allegation contained in Paragraph One to Thirty-three inclusive of its foregoing answer to the first count or charge of the said complaint as fully and completely as though the said several paragraphs were herein repeated verbatim, as a denial, admission or explanation of each allegation reincorporated in said complaint from

said first count or charge into the second count or charge by Paragraph One thereof.

132 Paragraph Two. This respondent denies each and every allegations contained in Paragraph Two of the second count or charge in said complaint.

Paragraph Three. This respondent alleges that among respondent's competitors transacting business in substantially the same manner as respondent, who have contracts containing substantially the same provision that their respective agents shall not sell or permit to be sold on the agent's premises any other make of patterns are The Pictorial Review Company, The McCall Company, The Home Pattern Company, The Peerless Pattern Company, as well as The Butterick Publishing Company, whose contracts containing such provisions have been in existence for many years; that if the effect of such provision is or "may be" to tend to create a monopoly, there would now exist in one line of commerce as many "monopolies" as there are manufacturers selling patterns through agents; that said competitors have acquired under said system of distributing patterns to the public at least four times as many agents as this respondent; that if the effect of said provision is or "may be" to substantially lessen competition, such competitors could not have established so many agencies; that all of said agencies of said competitors were established many years after this respondent adopted its form of contract containing said provisions and while respondent's contracts containing such provisions were in full force and effect; that all of said competitors' contracts with their respective agents are made

133 for terms of years; that whether the said competitors' contracts contained such provisions or not, respondent could not make a contract with any such agent of a competitor to be effective during the term of such competitor's contracts, without inducing a breach thereof; that the mere presence of such conditions in respondent's contracts makes impossible that the effect may be either to substantially lessen competition or to tend to create a monopoly; that the history of the pattern business over many years of operation has demonstrated that such is not the effect of said provision; that the effect of such provision must be determined by the results of its operation, and the experience of those engaged in the pattern business, and not by potential possibilities or fanciful or forced construction placed upon the words "may be" as they appear in said Act, and that so determined the effect thereof is not and "may be" not to substantially lessen competition or to tend to create a monopoly in the line of commerce in which this respondent is engaged, but on the contrary to stimulate and encourage competition and to prevent monopoly.

Paragraph Four. This respondent alleges that the provision in respondent's contracts that the agent shall not sell or permit to be sold on the agent's premises during the term of the contract any make of pattern other than those of respondent, is not within the purview of condemnation of said Act of Congress of October 15, 1914; that said said Act makes unlawful the acts therein specified only where the effect thereof may be to substantially lessen competi-

tion or to tend to create a monopoly in any line of commerce; that the acts charged in said complaint are not with respect to any line of commerce, but only with respect to one of many avenues
134 of distribution in one particular line of commerce; that even if the acts charged against this respondent in the complaint herein were true their effect would not and could not be as charged in Paragraph Two of said second count or charge in said complaint; that the patterns of this respondent are not "goods," "wares," "merchandise," "supplies" or "other commodities," within the meaning of said Act; that said patterns are not sold to the agents under said contracts for consumption or resale by said agents within the meaning of said Act; that the respondent does not fix a price charged therefor, or discount therefrom, or rebate upon such price, on the condition, agreement or understanding that the purchaser thereof shall not use or deal in the goods, wares, merchandise or other commodities of its competitor or competitors, within the meaning of said Act; that the agent is not a purchaser," within the meaning of said Act; that respondent's contracts, even if construed as contracts of sale, are not within the purview or condemnation of said Act; that the respondent's contracts do not prohibit the agent from dealing in or selling the goods, wares, merchandise or other commodities of a competitor within the meaning of said Act, but simply restrict such agent for a limited period (i. e., during the term of the contract) from selling in a special place (i. e., the place leased in which the exclusive agency for the sale of respondent's patterns is conducted) any other make of patterns; that the intent of said Act was not to make invalid or unlawful restrictions upon handling goods of a competitor in specific places for a limited time; that said Act makes illegal only a prohibition against the "purchaser" and
135 not a restriction against the use of a place; that even if said Act applied to such a restriction, the acts charged would not and could not constitute a violation of said Act; that fifty years' operation of respondent's contracts has not resulted in a lessening of competition or in tending to create a monopoly in any line of commerce; that there has grown up and now exists competition with this respondent in eighty per cent. of the whole number of agencies handling paper patterns in the United States; that the majority of the largest dry goods dealers in the United States handle respondent's competitors' patterns to the exclusion of respondent's; that a very substantial portion of the paper pattern trade in the United States, to wit, the sale through mail order houses, newspapers and periodicals other than those published by pattern manufacturers, is conducted entirely by respondent's competitors; and that the effect of the said provision in respondent's contracts is not, and with all reasonable intendment may not be to substantially lessen competition within the meaning of said Act; and that the effect thereof is not and may not be to tend to create a monopoly in any line of commerce.

Paragraph Five. For further answer in the nature of a plea in abatement to the second count or charge in the complaint herein, this respondent alleges that the joinder of the six respondents in one

proceeding is improper for the reason that the issues are not the same as to each, that the same evidence is not admissible as to each and the same principles of law are not applicable as to each, for which reason a severance is requested.

Paragraph Six. For further answer in the nature of a demurrer to the second count or charge in the complaint herein, this
 136 respondent avers that the said count or charge does not state facts sufficient to constitute a charge of violating the provisions of Section 3 of the Act of Congress approved October 15, 1914.

Wherefore, this respondent respectfully asks that the said complaint against it be dismissed.

NOBLE, MORGAN & SCAMMELL,
 JAMES B. SHEEHAN,

Attorneys for Respondent
The Designer Publishing Company, Inc.,

115 Broadway, New York City.

STATE OF NEW YORK,
County of New York, ss:

John T. Scanlon, being duly sworn, deposes and says that he is President of the respondent herein, The Designer Publishing Company, Inc., and resides in New York City; that he has read and knows the contents of the foregoing answer and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

JOHN T. SCANLON.

Sworn to before me this 3rd day of July, 1920.

[SEAL.]

A. P. SCHOEN,
Notary Public, No. 75, New York County.

137

EXHIBIT A.

Mutual Agreement Between The Designer Publishing Company, Inc. (Manufacturers of Standard New Idea Designer Patterns), of New York, First Party, and ———, of ———, Second Party.

First Party hereby grants to second party an Agency for the sale of its Patterns for —, in the City of —, for a term of three years from date hereof, and from term to term thereafter until this agreement is terminated, as hereinafter provided, and agrees to sell and deliver F. O. B. New York, or at its Branch Office in —, to second party, its Patterns at a discount of fifty per cent from retail prices, and advertising matter at the prices and on the conditions named on the reverse side hereof; also such other publications as may be issued by first party, at regular agents' rates; to allow second party to return discarded patterns semi-annually, between January 15th and February 15th, and July 15th and August 15th, in exchange,

at nine-tenths cost, for other patterns to be shipped at the time of return or thereafter, but not in exchange for other goods than patterns. Patterns returned for exchange must have been purchased by second party from first party direct and must be delivered in good order to first party at its General Office in New York, or branch office in ———.

Second Party agrees, in consideration of the above, to purchase from first party, for free distribution, Fashion Sheets to a number not less than — per annum, and to pay transportation
138 charges on all goods ordered or returned under this agreement; to purchase from first party and keep on hand at all times, — Dollars' value in Patterns at net invoice prices, and to pay first party for a pattern stock of the amount stated above, to be selected by the first party, the terms of payment to be as follows: — Dollars at time of signing this contract, and — Dollars in thirty days after shipment of stock, the balance of the purchase price, — Dollars, to remain unpaid, as a Standing Credit, during the continuance of this agreement, and to become due and payable at its termination, second party to pay interest on this Standing Credit at the rate of five per cent per annum on January 15th of each year; all other purchases to be paid for on or before the 15th day of the month succeeding the date of shipment.

Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of said first party, not to sell or permit to be sold on the premises of second party, during the term of this contract, any other make of patterns and not to sell Patterns except at label prices. Second party further agrees to permit first party or its representative to take account of pattern stock whenever it desires, to pay proper attention to the sale of Patterns, to conserve the best interests of the agency at all times, to re-order promptly all patterns as sold, and to give the department a permanent position on the ground floor in the store.

139 Either party, desirous of terminating this agreement, must give the other party three months' notice in writing, within thirty days after the expiration of any contract period as above specified, the agency to continue regularly during such three months. Upon expiration of such notice, second party agrees to promptly return to first party all Patterns bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due. Failure to require compliance with the strict letter of this agreement shall not constitute a waiver of any condition nor forfeit nor prejudice any right hereunder.

It is hereby acknowledged by both parties that there are no verbal understandings between them conflicting with this contract.

Dated ———, 19—.

THE DESIGNER PUBLISHING CO.,
INC.,

Per ———,
(*First Party.*)

—————,
(*Second Party.*)

Done at ———.

140

Affidavit.

Filed July 29, 1920.

* * * * *

DISTRICT OF COLUMBIA, ss:

Hartwell P. Heath, being duly sworn, says:

I am one of the attorneys for the plaintiff in the above entitled action.

The motions referred to in paragraph 12 of the complaint herein came on for hearing and were argued before the Federal Trade Commission, the defendant aboved named, at the office of said Commission, on July 28th, 1920, and were argued by me and the other attorneys for the plaintiff, and in reply by the counsel for the Commission.

At 5.20 o'clock P. M. July 28th, 1920, the Commission announced its decision in writing as follows:

"The action of the Commission on the several motions presented in the case of Docket No. 594 is as follows:

The motions to dismiss on behalf of the Butterick Company, Federal Publishing Company, New Idea Pattern Company, and Standard Fashion Company, are reserved until the evidence in the cause has been taken and considered.

The Commission does not find sufficient facts now before it, to warrant orders of dismissal at this stage.

The motions made on behalf of the Butterick Publishing Company and Designer Publishing Company, for severance are denied. The cause of action against each respondent is practically the same in

141 character, the severance would cause delay and increase the expense of the proceedings. The Commission will see that no injustice results by reason of applicability of evidence or otherwise.

As to the plea in abatement attempted to be presented by the answer, the Commission takes the view that this is an application to its discretion rather than the exercise of a legal right. In this respect the Commission concludes that the taking and consideration of testimony is requisite to the exercise of a sound judgment upon the propositions advanced in the answer as in the nature of a plea in abatement. The Commission holds that its final disposition of a

complaint may not be controlled by a presentation of an ex parte statement, and that the Commission may in its discretion, require a complaint to be fully heard.

This part of the answer will therefore be regarded as a motion to dismiss as to each and all of the respondents and action thereon is reserved until the evidence has been received and considered.

This hearing will proceed at the time and place previously arranged."

The direction in the foregoing decision is that the hearings will proceed at the time and place previously arranged, to wit, at the office of the Federal Trade Commission, in the city of Washington; at 10 o'clock a. m. on July 29th, 1920 with the taking of testimony before an Examiner of the Federal Trade Commission.

The taking of testimony will necessitate officers and other employees of the plaintiff leaving their business under subpoena
142 of the Commission and coming to Washington, and attending said hearings, and being examined as witnesses, at great loss of time and money to the plaintiff and unnecessarily expose the plaintiff to the pains and injuries set forth in the complaint; and that unless a restraining order is forthwith issued the damage will be inflicted to great and irreparable wrong to the plaintiff.

Wherefore, the matter is one of urgency and does not admit of giving formal notice but requires action forthwith by the court.

The Federal Trade Commission and its counsel have been advised that this application was about to be made.

The plaintiff has stated all the facts in the case to me and to counsel associated with me and we together have advised plaintiff that it has a good and substantial cause of action, and that in our opinion the injunction hereby applied for should be granted.

This application is made in good faith and upon advice of counsel and not for the purpose of delay, but to protect the lawful interests of the plaintiff.

HARTWELL P. HEATH.

Subscribed and sworn to before me this 29th day of July, 1920.

MORGAN H. BEACH,

Clk.,

By F. E. CUNNINGHAM,

Asst. Clk.

143

Rule to Show Cause.

Filed July 29, 1920.

* * * * *

On the bill of complaint filed herein and the affidavit of Hartwell P. Heath verified July 29th, 1920, and it appearing to the court that the defendant on July 28th, 1920, until the evidence in the case had been taken and considered reserved decision upon the motion to dismiss on behalf of the Standard Fashion Company and the New

Idea Pattern Company, and denied the motion on behalf of the plaintiff for a severance of the proceeding under the complaint, Exhibit C attached to the bill of complaint herein, and reserved decision upon the motion to dismiss said proceeding under said Exhibit C until the evidence had been received and considered, and that the defendant proposes to proceed at ten o'clock a. m. July 29th, 1920 to take testimony under said complaint, Exhibit C, and that the taking of such testimony will result in irreparable damage to the plaintiff.

Now, therefore, it is hereby ordered this July 29th, 1920, that the defendant show cause before this court on the 5th day of August 1920, at 10 o'clock in the forenoon, why a preliminary injunction should not issue in the above entitled action as prayed in the bill of complaint herein, upon the plaintiff filing an undertaking in the sum of five hundred dollars to pay the costs and damages, if any, the defendant may suffer by reason of the issuance of this order.

Pending the hearing and decision of said order to show cause the defendant, the Federal Trade Commission, its members, officers, attorneys, agents, employes and representatives, are restrained
144 from further proceeding under said complaint, Exhibit C.

WALTER I. McCOY,
Chief Justice.

Motion to Dismiss.

Filed August 5, 1920.

* * * * *

Now comes the defendant, Federal Trade Commission, by its Chief Counsel, Claude R. Porter, and respectfully moves the Court to dismiss the bill of complaint herein and that it take its costs to be taxed in this suit, for the following reasons:

(1) The bill of complaint herein does not state sufficient facts to constitute a valid cause of action in equity against the defendant, because

(a) It is shown on the face of the bill that the complainant has a remedy at law as practical and efficient to the ends of justice and its prompt administration as any remedy in equity; and (b) there are no facts pleaded showing that the complainant will sustain an irreparable injury if relief in equity is denied, nor are any facts pleaded which otherwise show complainant entitled to relief in equity.

CLAUDE R. PORTER,
*Chief Counsel for Federal
Trade Commission, Defendant.*

E. C. ALVORD,
MARVIN FARRINGTON,
Attorneys.

145

Decree Dismissing Bill.

Filed August 12, 1921.

* * * * *

The above entitled cause having been brought on to be heard, on the 9th day of May, 1921, on reargument of the motion of the defendant above named to dismiss the bill of complaint herein, before the Hon. William Hitz, Associate Justice of said Court; Adrien F. Busick and E. C. Alvord, solicitors for the defendant herein appearing in support of said motion, and Herbert Noble, Esq., and Hartwell P. Heath and James B. Sheehan, solicitors for the complainant appearing in opposition thereto;

Counsel for the respective parties above named having argued said motion orally and having submitted briefs in support thereof and in opposition thereto, and the Court having taken said motion under advisement, and being now fully advised in the premises;

It is ordered that said motion of the defendant be and the same hereby is granted and that this cause be and the same hereby is dismissed for want of equity, and that the defendant recover of and from the complainant its costs in this behalf incurred.

By the Court

WILLIAM HITZ,
Associate Justice.

Dated this 12 day of August, 1921.

From this order the Complainant appeals to the Court of Appeals.
W. H.

146

Order Fixing Bond on Appeal.

Filed October 17, 1921.

* * * * *

Whereas a decree was entered in the above entitled suit dismissing the bill of complaint therein on August 12th, 1921, and at the same time an appeal from said decree to the Court of Appeals of the District of Columbia was taken by the plaintiff,

Now on motion of Noble, Morgan and Scammell, attorneys for the plaintiff, it is

Ordered, nunc pro tunc that the amount of the appeal bond be and the same hereby is fixed at One Hundred Dollars (\$100.00).

WILLIAM HITZ,
Associate Justice.

Dated October 17th, 1921.

Memorandum.

October 17, 1921.—Undertaking on appeal approved and filed.

Assignment of Errors.

Filed October 17, 1921.

* * * * *

The plaintiff and appellant hereby assigns the following errors in the decision and decree of the court in the above entitled case:

1. The court erred in granting the motion of the defendant to dismiss the cause for want of equity.
- 147 2. The court erred in not denying the motion of the defendant to dismiss the cause for want of equity.
3. The court erred in dismissing the cause for want of equity.
4. The court erred in not granting the preliminary injunction restraining the defendant from proceeding further under the complaint issued by the defendant against the plaintiff, Docket No. 594, attached as Exhibit "C" to the complaint herein, as prayed in the complaint in the above entitled cause.
5. The court erred in awarding costs to the defendant against the plaintiff in the above entitled cause.

Dated, New York, October 8, 1921.

NOBLE, MORGAN & SCAMMELL,
Attorneys for Plaintiff.

HERBERT NOBLE,
JAMES B. SHEEHAN, AND
HARTWELL P. HEATH,
Of Counsel.

Designation of Record.

Filed October 17, 1921.

* * * * *

The Clerk of the Court in preparing the transcript of the record on the appeal of the plaintiff in the above entitled cause will include therein the following:

1. The plaintiff's bill with exhibits A, B, B¹, C and D thereto attached.
2. The order to show cause why a preliminary injunction should not be granted made by Chief Justice McCoy July 29, 1920, with affidavit on which granted.
- 148 3. The defendant's motion to dismiss.
4. The decree.
5. The assignment of errors.
6. This designation.

NOBLE, MORGAN & SCAMMELL,
Attorneys for Plaintiff.

149 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 148, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 38106 in Equity, wherein The Designer Publishing Company, Inc., is Plaintiff and Federal Trade Commission is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of October, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

L. M. G.

Endorsed on cover: District of Columbia Supreme Court. No. 3741. The Designer Publishing Company, Inc., appellant, vs. Federal Trade Commission. Court of Appeals, District of Columbia. Filed Oct. 25, 1921. Henry W. Hodges, clerk.

